MANAGING DISPUTES THROUGH CONTRACT: EVIDENCE FROM M&A

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An important set of contract terms manages potential disputes.In a detailed, hand-coded sample of mergers and acquisition (M&A) contracts from 2007 and 2008, dispute management provisions correlate strongly with target ownership, state of incorporation, and industry, and with the experience of the parties' law firms.For Delaware, there is good and bad news. Delaware dominates choice for forum, whereas outside of Delaware, publicly held targets' states of incorporation are no more likely to be designated for forum than any other court.However, Delaware's dominance is limited to deals for publicly held targets incorporated in Delaware, Delaware courts are chosen only 20% of the time in deals for private targets incorporated in Delaware, and they are never chosen for private targets incorporated elsewhere, or in asset purchases.A forum goes unspecified in deals involving less experienced law firms.Whole contract arbitration is limited to private targets, is absent only in the largest deals, and is more common in cross-border deals.More focused arbitration—covering price-adjustment clauses—is common even in the largest private target bids.Specific performance clauses—prominently featured in recent high-profile M&A litigation—are less common when inexperienced M&A lawyers involved.These findings suggest (a) Delaware courts' strengths are unique in, but limited to, corporate law, even in the "corporate" context of M&A contracts; (b) the use of arbitration turns as much on the value of appeals, trust in courts, and value-at-risk as litigation costs; and (c) the quality of lawyering varies significantly, even on the most "legal" aspects of an M&A contract.

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Introduction

Transactional lawyers perform four tasks:they advise, document, negotiate, and process. Core to the first task is the anticipation of disputes. Where feasible, and cost-effective, disputes can be managed in advance, by contract. Substantively, advance dispute management consists of advising clients so they are clear about the deal, and of setting out that deal clearly in the contract document—in effect, to not simply manage but resolve disputes in advance. Not all disputes can be foreseen, however, and among disputes that are anticipated, many arise too infrequently to justify advance negotiation, resolution, and documentation. Disputes that are unforeseen or unresolved in advance can still be managed, to an extent, in the deal contract, through a variety of contract terms.

An important set of DISPUTE MANAGEMENT PROVISIONS (DMPs) consists of contract terms that alter or clarify the default rules of civil procedure that would otherwise apply to a contract dispute. Chief among DMPs are those explicitly aimed at managing litigation, such as (a) clauses mandating and setting the scope for arbitration, (b) choice of law clauses, (c) forum selection clauses, (d) jury waivers, (e) clauses allocating legal costs in the event of a dispute, and (f) clauses attempting to increase or decrease the odds that a court will award specific performance as a remedy in the event of breach.

This paper provides evidence on the incidence and correlates of a set of DMPs in a matched sample (n=120) for important class of contracts—those governing mergers and acquisitions (M&A). The sample begins with control acquisition bids for US targets, randomly drawn from the Thomson SDC Platinum M&A database, announced in 2007 and 2008, a period that led up to and straddles the recent financial crisis. One half of the sample consists of deals for public targets, and the other consists of deals for private targets, with the two halves matched by size and industry. This research design is motivated in part by prior research on DMPs (see Part I below) reaching contrasting results that could be (but have not been shown to be) the result of samples that differ on whether targets were publicly held. The research design also links the results presented here to those presented in a series of related papers,[1] also relying on the same sample, that together demonstrate the extent to which ownership structure shapes M&A practice. But since the sample is randomly drawn from all control bids for US targets in the sample period, without regard to size, the data are of independent interest for analyzing and understanding the content of M&A agreements, such as DMPs, and their correlates.

Throughout, the emphasis is on correlation. The empirical approach is standard case-control observational design, enhanced with public-private target matching. These methods can rule out potential confounding factors through the matching itself and through multivariate regressions using other observable and measurable factors, and they can put limits on the degree to which the correlations may be due to random chance. The results of such studies have limits. No such study can definitely establish the causal mechanisms behind the correlations, and the correlations are only as reliable as the generality and persistence of the underlying data-generating processes.[2]

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[1] *See* John C. Coates IV, *The Powerful and Pervasive Effects of Ownership on M&A* 1–2, 33 (Harv. Law Sch. John. M. Olin Ctr. for Law, Econ., and Bus., Discussion Paper No. 669, 2010) [hereinafter Coates, *Powerful and Pervasive Effects*]

[2] M&A contracting does not lend itself readily to experimental or quasi-experimental analysis. Experiments with genuine external validity are simply too expensive, impractical, or ethically undesirable to run in M&A, or indeed in law generally. For example, for-profit businesses will not accept a randomly assigned "treatment" for important factors (e.g., a given ownership structure, state of incorporation, or industry) to allow a researcher to control whether that treatment has an effect on M&A practices, and it is unclear whether a lawyer could ethically participate in such a study. Nor are most M&A topics susceptible to quasi-

These limitations should not be overstated. Standard case-control studies have established causation in important contexts (e.g., tobacco causes lung cancer[3]). Provisional causal inferences can be drawn from observational data, and the reliability of such inferences can be improved by triangulating on the topic within a study or across studies with different samples, study designs, or methods (e.g., case-study, interview- or experience-based evidence to rule out potential confounding factors). As or more importantly, reliable correlations enable predictions (e.g., sunrise, winter, bird migration) without an attempt to model (or even knowledge of) causes, and predictions can be as or more valuable than empirical proof of valid but narrow causal mechanisms.

Among the general findings are (1) DMPs are common but vary systematically; (2) DMPs correlate strongly with target ownership, and to a lesser extent with deal size; and (3) some DMPs independently correlate with M&A experience of lawyers involved. More specifically:

1. Delaware is the dominant choice for law and forum—but only in deals for publicly held targets incorporated in Delaware. This dominance is striking: when publicly held targets are incorporated outside of Delaware, the targets' states of incorporation are no more likely to be designated for forum than any other court.
2. However, when it comes to private target deals, Delaware courts are chosen only 20% of the time, even in deals for targets incorporated in Delaware, and *never* for private targets incorporated elsewhere. They are also never chosen in deals structured as asset purchases.
3. A forum goes unspecified in deals involving less experienced lawyers and in deals in the financial industry.
4. Arbitration of an entire contract is limited to private target deals, is absent only in the largest deals, and is more common in cross-border deals,
5. More focused arbitration clauses—covering price-adjustment clauses—are common even in the largest private target contracts.
6. Specific performance clauses—prominently featured in recent high-profile M&A litigation—are less common when inexperienced M&A lawyers are involved and in the financial industry, and are more common in public target deals.

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experiments such as regression discontinuity or interrupted time-series ("event study") designs, as few M&A contract choices are plausibly determined by factors that reflect exogenous thresholds, discontinuities, or events (and when they are, external validity remains a concern, often as serious as omitted variable concerns about standard case-control studies, such as this one).

[3] *See*, *e.g.*, Peter B. Bach, *Smoking as a Factor in Causing Lung Cancer,* JAMA (2009), http://jama.ama-assn.org/content/301/5/539.full.

These findings are consistent with the hypotheses that (a) Delaware courts' strengths are unique in, but limited to, corporate law, even in the "corporate" context of M&A contracts, (b) the advantages of arbitration in M&A are related to the value of appeals, trust in courts, and value-at-risk as much as litigation costs, and (c) the quality of lawyering varies significantly, even on the most "legal" aspects of the M&A contract.

The plan of the paper is as follows. Part I reviews prior empirical literature on DMPs. Part II applies economic theory, with an emphasis on how law and economics interact, to develop hypotheses on how background substantive law affects the value of DMPs in M&A contracts, and on how deal lawyers as agents may have private incentives to include or shape DMPs of various kinds. Part III introduces data on the incidence of DMPs in M&A contracts, and Parts IV through VI tests the hypotheses developed in Part II against that data. The paper concludes with a brief discussion of normative and practical implications.

I. Prior Empirical Literature on DMPs in M&A Contracts

Prior empirical work on the content of contracts of any kind is relatively uncommon. Prior work focused on M&A contracts is even more so. Prior empirical studies of DMPs in M&A contracts can be counted on one hand. Two excellent prior studies focus on clauses designating law and forum in M&A agreements, but produce contrasting results: Eisenberg & Miller 2006 (E&M), who find that New York does better than Delaware in attracting contract designations, after accounting for the parties' states of incorporation,[4] and Cain & Davidoff 2010 (C&D), who find that Delaware does better, and continued to gain market share in the 2000s.[5] In addition, several studies by Eisenberg and Miller and a small number of other studies report data on other types of DMPs—including arbitration clauses, jury waivers, and attorneys' fee provisions—in various kinds of "material" contracts filed by public companies with the SEC, including merger or asset purchase agreements. These studies are briefly reviewed here.

E&M study 412 M&A agreements filed with the Securities and Exchange Commission (SEC) in 2002. They report Delaware law was chosen 32% of the time, and Delaware courts 16% of the time.[6] They find intuitive positive correlations between (on the one hand) choice-of-law and forum and (on the other hand) the states of incorporation and principal places of business of buyers and targets, and to a lesser extent, location of attorneys

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[4] *See* Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 Vand. L. Rev. 1975, 1992 (2006) [hereinafter Eisenberg & Miller, *Ex Ante Choices*].

[5] *See* Matthew D. Cain & Steven M. Davidoff, *Delaware's Competitive Reach*, 9 J. Empirical Legal Stud. 92, 95–96 (2012).

[6] Eisenberg & Miller, *Ex Ante Choices*, *supra* note 4, at 1987.

for the reporting firms.[7] In regressions, they find Delaware is chosen more than any other state, but after controlling for state of incorporation, firms MOVE AWAY FROM DELAWARE, towards New York and California. [8] However, for publicly held targets, Delaware was more likely to be selected for law (47% public target v. 23% private target) and forum (51% v. 15%),[9] a finding that E&M suggest is consistent with what they (at 1995) kindly refer to as the "Coates-Kahan hypothesis," viz., that a target's state of incorporation is an especially attractive choice of law for publicly held targets.[10]

C&D study 1,020 merger agreements for publicly held targets with market capitalizations greater than $100 million between 2004 and 2008.[11] They find that Delaware law and courts were chosen in their sample more frequently (66% and 60%) than any other state.[12] They also report that Delaware was chosen more often for both law and forum when deals were larger, when either buyer or target are incorporated in Delaware, the deal is all-cash, or the buyer retains a top ten law firm.[13] They find a net flow of choice-of-law and forum selection *towards Delaware* rather than away in public company merger agreements, controlling for target states of incorporation, but towards New York as well.[14] They also find that the preference for Delaware increased in the mid-2000s, with flows negative in 2004 but positive in 2008.[15] C&D also study a separate sample of deals from the same period that wasstudied in E&M, and find that differences in their results can be attributed to time trends and different samples—i.e., the mix of public and private targets and different deal structures (stock and asset purchase agreements) in

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[7] *See id.* at 2011–12.

[8] Price 2008 finds that 57% of merger agreements from 2006 choose Delaware law, 41% choose Delaware as forum, and 29% do not choose a forum at all. Brian E. Price, *Strategic Choices in Merger Agreements: A Study of Decisions to Choose (And Not to Choose) Law and Forum*, 4 N.Y.U. J. L. & BUS. 647, 657–58 (2008).Similar to E&M, he finds an outward flow from Delaware to New York and California law relative to the buyer's state of incorporation is used as a benchmark, and a flow towards Delaware when the target's state of incorporation is used. Eisenberg & Miller 2007 study a large (n=2,858) sample of material contracts filed with the SEC in 2002, including M&A agreements. Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies,* 56 DEPAUL L. REV. 335, 348 (2007) [hereinafter Eisenberg & Miller, *Flight from Arbitration*]. As in E&M, Delaware is chosen most frequently (32%) for merger agreements, versus 17% choosing New York. But New York leads as choice of law in asset purchase agreements (25%), versus 10% choosing Delaware. *Id.* For both types of M&A agreements, those designating Delaware for law are more likely to designate another state for forum than is true for contracts choosing New York for law.

[9] Eisenberg & Miller, *Ex Ante Choices*, supra note 4, at 1996.

[10] *See id.* at 1995. (Marcel Kahan and I independently suggested this hypothesis to E&M while they were working on their paper).

[11] *See* Cain &Davidoff, *supra* note 5, at 100.

[12] *See id.* at 105.

[13] *See id.* at 123.

[14] *See id.* at 94.

[15] *See id.* at 95.

E&M, as against exclusively public targets and merger agreements in C&D.[16]

Arbitration clauses have also been studied. They are included in 19% of both merger agreements and asset purchase agreements included among a large sample of material contracts filed by public companies with the SEC in 2002.[17] This is much lower than the 75% incidence of arbitration clauses found in consumer contracts of large public corporations, but higher than the11% overall found in "material" contracts filed by public companies with the SEC.[18] A survey of the Fortune 1000 in the late 1990s found that firms reported that they were significantly less likely to use arbitration in corporate finance matters than in other matters (12% vs. 42% for contract disputes generally), and most surveyed expected a decline in arbitration of corporate finance contract disputes.[19]Firms reported using arbitration to save on cost and time, to avoid discovery and creating legal precedent, because it created a more satisfactory process, and because they were in disputes with international parties.[20] Firms reported avoiding arbitration because of the difficulty of appeal, because arbitrators were not confined to legal rules, because arbitrators lacked expertise in certain subjects, and because arbitration resulted in compromise outcomes.[21]This prior research has failed to resolve the question of why some, but not all, M&A contracts include arbitration clauses.

No prior empirical study of DMPs has focused on specific performance clauses. This gap in prior research is noteworthy because of the prominent role that such clauses played in several M&A disputes that emerged from the financial downturn in 2008. One example was the dispute between United Rentals, the largest equipment rental company in the world, and Cerberus Partners, a prominent private equity firm.[22] The dispute was not settled and led (surprisingly) to a bench trial and court decision.[23]The Delaware Chancery Court relied on an obscure judge-made principle of contract interpretation, instead of the language of the contract, to find that a specific performance clause in the contract for a deal between the litigants had no legal meaning.[24]

Furthermore, none of the prior studies have focused carefully on differences between DMPs in M&A contracts for public and private targets.

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[16] *See id.*

[17] Eisenberg & Miller, *Flight from Arbitration*, *supra* note 8, at 362.

[18] *See id.* at 351.

[19] *See* David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* 11 (Martin and Laurie Scheinman Inst.on Conflict Resolution, Paper No. 4, 1998), *available at* http://digitalcommons.ilr.cornell.edu/icrpubs/4.

[20] *See id.* at 17.

[21] *See id.* at 26.

[22] *See* United Rentals, Inc. v. RAM Holdings, 937 A.2d 810, 814 (Del. Ch. 2007).

[23] *See id.*(stating that a trial was necessary to ascertain the meaning of the agreement).

[24] *See id*. at 835 (relying on the "forthright negotiator" principle); *but see* In Re IBP, Inc. S'holders Litig., IBP, Inc. v. Tyson Foods, Inc., 789 A.2d 14 (Del. Ch. 2001) (specifically enforcing M&A contract).

While E&M include both public and private targets, and control for public target status, they do not match public and private targets, or otherwise control for interactions between public company status and other potential confounding variables, such as size, which clearly correlates with ownership.[25] In addition, they do not control for deal structure, which has important implications for the law governing an M&A contract, as discussed in Part II below.[26] Thus, while their findings supporting the "Coates-Kahan" hypothesis are highly suggestive, they could stand additional testing, and one of the aims of this article is to replicate and more carefully test their findings.

C&D limit their sample to public company targets, and do not study the contrast at all. They justify their sample selection on three grounds: public target deals are bigger and more "significant and complex," private target deals are more heavily negotiated, and not all private target deals are observable.[27] It is true that size and public company status are correlated—but many private companies are very large.[28] In fact, most US companies with more than $250 million in revenues are privately held and the dollars involved in private target M&A are of the same order of magnitude as those involved in public target M&A.[29] It is also far from clear that public target deals are "more complex," as C&D assert—public and private target deals differ in a variety of ways, but each type of deal contains important and complex types of contract provisions not found in the other.[30] From the perspective of law and lawyers, finally, there are many more private target deals than public target deals; many more M&A contracts for private target deals; and many more lawyers drafting and negotiating M&A contracts for private target deals.

It is also not clear that private target deals are more heavily negotiated, as C&D assert.[31] While there are elements of a private target contract (e.g., indemnification provisions) that are missing from public target contracts, the reverse is also true (e.g., fiduciary duty provisions). The intensity or weight of negotiations is a nebulous concept: does it refer to the subject psychological perceptions of the negotiators, or to the complexity of the contract (which C&D inconsistently claim is actually greater for public company deals), or to the degree to which the price is affected by various non-price

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[25] *Compare* Coates, *Powerful and Pervasive Effects*, *supra* note 1,at 6, *with* Eisenberg & Miller, *Ex Ante Choices*, *supra* note 4, at 1981.

[26] C&D also note that E&M do not account for the simultaneity of the choice of forum and choice of law in a given M&A contract. While true, the point does not invalidate E&M's basic observational findings; C&D's effort to account for simultaneity is not convincing; it remains unclear whether a theoretically valid means of coping with simultaneity of DMP choices is possible, given current statistical technology. *See* Cain &Davidoff, *supra* note 5, at 125.

[27] *Id.* at 100–01.

[28] Coates, *Powerful and Pervasive Effects*, *supra* note 1, at 6, 13.

[29] Cain & Davidoff, *supra* note 5, at 37.

[30] *See id.* at 126; *see also* Coates, *Powerful and Pervasive Effects*, *supra* note 1, at 33.

[31] Cain & Davidoff, *supra* note 5, at 13.

terms (which would be an interesting but difficult issue to investigate)? Whatever it means, no existing evidence that supports claimed differences on this score could justify ignoring private target deals.

C&D's best point on this issue is that not all private target M&A contracts are observable, which is true. Only contracts for deals that are "material" under the securities laws for the bidder are required to be filed with the SEC. As a result, any sample of private target contracts will not necessarily be representative of the entire population of private target contracts. However, "materiality" is defined by reference to the bidder, and many publicly held bidders are surprisingly small in size.[32] As a result, private target M&A contracts available at the SEC run the range of target size from very small to very large. Private targets (and the contracts studied in this paper) span across the full range of industries for US companies generally, can be found in every region of the US, and are represented by the full range of law firms. On all of these dimensions, the available private target contracts and the unobservable ones are likely to be similar.

While observable private target deals should be comparable to public target deals on size, industry, and law firms, there may be other dimensions on which the deals differ. For example, public company bidders are subject to their own public reporting obligations, may need their own shareholders to approve a deal, and have publicly listed stock to use as deal currency. Those differences may make it easier (or harder) for them to accomplish certain kinds of deals, which may in turn be reflected in M&A contracts. That said, the number of private-target deals for which SEC-filed agreements are available is large, and the deals are important, and the contracts are likely to differ more from public target M&A contracts than from private target M&A contracts not filed with the SEC.[33] The DMPs contained in those agreements, and the contrasts with public target M&A contracts, are thus of interest to lawyers working on those deals, to courts resolving disputes about those deals, and to academics interested in understanding the full range of contracting choices in the world of M&A, and in understanding the degree to which DMP choices cause the procedural laws on the books to differ from those applicable in practice.

II. Theory: The Law and Economics of DMPs and Deal Lawyers

Two branches of economics, as applied to law, are relevant to DMPs in M&A contracts. The first concerns ownership dispersion, which varies significantly among US firms.[34] A number of consequences for M&A flow from dispersed ownership, based on the interaction of law and the economics of ownership. A second branch of economic theory—agency theory—

[32] *See* Coates, *Powerful and Pervasive Effects*, *supra* note 1, at 19.
[33] *See id.* at 20–21.
[34] *See id.* at 28–30.

also has lessons for the incentives that M&A lawyers have for including DMPs, or particular versions of DMPs, in M&A contracts. Each branch of economic theory is integrated with legal analysis in this section to develop hypotheses to be tested in the remainder of the paper.

A. The "Delaware Courts are Generally Best" Hypothesis

As a starting point, one might expect that the sophisticated kinds of lawyers involved in drafting and negotiating M&A contracts would specify the "best" court system for dispute resolution. What the "best" is might not always be clear, but courts have a number of attributes that can be observed, including speed, cost, and specialization, which can be expected to produce expertise, given frequent enough litigation. On all three of these dimensions, the Delaware Chancery Court is widely viewed as better than other courts. [35]

A straightforward hypothesis, then, would be that Delaware courts would be specified more frequently than other courts in M&A contracts. Let us call this the "Delaware Courts are Generally Best" hypothesis.

Alternative Hypothesis 1a. Delaware courts will be designated more often than other courts in all types of M&A contracts involving all types of companies.

This, essentially, is the view of C&D, reviewed above in Part I, who conclude: "our results provide support for the theory that Delaware competes by providing quality governing law, and particularly, adjudicative services."[36]

B. Alternatives: The Coates-Kahan Hypotheses

A contrary view is that Delaware courts are chosen in M&A contracts only or primarily because of Delaware's dominance as the leading state for incorporation, a dominance that is strongest for public companies. This alternative "Coates-Kahan hypothesis," first set out and supported by E&M,[37] is worth developing in more detail, since the economic and legal factors underlying it—both derived from the ownership dispersion that typically accompanies public company status—are more complex than might first appear. In fact, a family of related and alternative Coates-Kahan hypotheses can be tested empirically.

Ownership dispersion both creates higher costs for owners to act collectively (e.g., to sell shares simultaneously to the same buyer) and interacts

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[35] *See* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U.CIN. L. REV. 1061, 1063–64 (2000) (noting the prevalence of Delaware incorporation).

[36] Cain & Davidoff, *supra* note 5, at 1.

[37] *See* Eisenberg & Miller, *Ex Ante Choices*, *supra* note 4, at 1988.

with each of the four major sets of laws governing M&A: corporate law, contract law, securities law, and antitrust law. One interaction between law and ownership arises from efforts by corporate law to constrain the agency costs that arise when ownership dispersion leads to a separation of ownership and control.[38] Corporate law imposes both bright-line rules requiring shareholder approval of certain corporate acts and vague fiduciary duty standards on directors and officers.[39]

Although neither approval rules nor fiduciary duties are formally triggered by the ownership of companies, their practical significance grows as ownership is dispersed. In particular, fiduciary duties are more important for targets with dispersed ownership. These duties can be expected to generate litigation owing to their vague nature and because they can "trump" otherwise enforceable contracts. This is particularly evident in cases involving so-called "fiduciary outs" and "no-shop clauses," which are contract provisions attempting to specify when a target board must accept a "topping bid" that is brought after an original M&A contract is signed, or negotiate with or provide information to the topping bidder.[40] Fiduciary duties also impose important limits on break fees that are payable to the initial bidder if a topping bid is accepted by the target. [41] Because public companies are more likely to have dispersed owners than private companies, these duties are most important in public target deals. As a result, contracts in M&A transactions involving publicly held targets are more likely to choose a forum for dispute resolution that can be expected to produce generally acceptable legal decisions in a relatively rapid fashion.[42]

So far, this analysis would generate a slightly modified version of the Delaware Courts are Best hypothesis: Delaware courts are best at resolving disputes involving public companies, which means that they will be chosen more often than other states when an M&A transaction involves a public company. But corporate law is not the same in all states. While corporate

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[38] ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 127–38 (1932).

[39] ROBERT C. CLARK, CORPORATE LAW 35–39 (1986).

[40] *See, e.g.*, Karl F. Balz, *No-Shop Clauses*, 28 DEL. J. CORP. L. 513, 518 (2003); *see also* Guhan Subramanian, *Go-Shops vs. No-Shops in Private Equity Deals: Evidence and Implications*, 63 BUS. LAW. 729, 730 (2008).

[41] *See, e.g.*, John C. Coates IV & Guhan Subramanian, *A Buy-Side Model of M&A Lockups: Theory and Evidence*, 53 STAN. L. REV. 307, 383, 387–88 (2000) [hereinafter Coates & Subramanian, *Buy-Side Model*] (fiduciary duties impose limits on break fees).

[42] It should be noted that ordinary derivative lawsuits brought by shareholders in response to an M&A transaction, claiming for example that the target board failed to follow its fiduciary duties in approving a deal, would not be bound by the forum selection clause in the M&A contract, and such suits could be brought in any state or federal court with jurisdiction, including but not limited to courts in the target's state of incorporation. Nor would litigation brought by a hostile or topping bidder seeking to enjoin deal protections contained in the initial bid contract. But disputes arising under the contract between the bidder and target would be covered by such a clause, even if the issues involved are primarily ones governed by corporate law, such as whether a given contract provision was consistent with the target's fiduciary duties.

law does not vary dramatically from state to state, there are a number of important doctrines and statutory provisions, including some relevant to M&A, which do vary.

For example, appraisal rights are triggered by different kinds of transactions, and involve different kinds of valuations, that do vary significantly, from state to state, and state courts often look to appraisal case law in assessing "fair value" in fiduciary duty cases.[43] Delaware's Revlon doctrine has been rejected in many states.[44] Takeover laws vary: some states (e.g., California) have no takeover statutes, while others (e.g., Massachusetts, Maryland, Pennsylvania, and Georgia) have statutes that are more restrictive than Delaware's takeover statute.[45] California makes cashing out minority shareholders difficult,[46] and restrictions on dividends and other capital transactions more generally vary significantly by state,[47] as do successor liability doctrines.[48]

In general, these differences will be more likely to track the target company's state of incorporation, as opposed to the bidder's state of incorporation, or the location of the target or bidder's headquarters or operations. These differences become most salient when a deal is most likely to generate corporate law disputes, i.e., when ownership is dispersed, as with a public company target. Thus, it is particularly the interaction of public company status for the target, and the fact that the target is incorporated in Delaware, which will make Delaware courts the most expert resolvers of disputes likely to arise for a given M&A transaction. Thus, one version of the Coates-Kahan hypothesis is not merely that Delaware courts will be best only or primarily in public company M&A, but also that they will be best only or primarily in public company M&A involving Delaware targets.

Whether Delaware courts are viewed as PARTICULARLY good at the more limited task of interpreting corporate law in deals for public company

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[43] *See* John C. Coates IV, *"Fair Value" as an Avoidable Rule of Corporate Law: Minority Discounts in Conflict Transactions*, 147 U. PA. L. REV. 1251, 1257–62 (1999).

[44] Guhan Subramanian, *Revisiting the Mechanisms of Market Efficiency: The Drivers of Market Efficiency in* Revlon *Transactions*, 28 IOWA J. CORP. L. 691, 704 (2003) ("California, Indiana, Pennsylvania, New Jersey, North Carolina, Ohio, and Virginia have explicitly rejected *Revlon* through a combination of statutory law and case law.").

[45] *See* John C. Coates IV, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 846–50 (1989) (discussing state takeover statutes); *see also* MD. CODE ANN., CORPS. & ASS'NS § 2–201(c)(2)(ii) (West 1999) (authorizing dead-hand pill provisions limited to 180 days); *id.*at §§ 3–802–03 (1999) (imposing staggered boards on public companies with three independent directors);15 PA. STAT. ANN. § 2572(a)(4) (West 1990) (imposing constraints on proxy fights); Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 FORDHAM L. REV. 843, 859 (1993) (discussing Pennsylvania's statute).

[46] *See* CAL. CORP. CODE § 1101(e) (West 2000).

[47] *See* Craig A. Peterson & Norman W. Hawker, *Does Corporate Law Matter? Legal Capital Restrictions on Stock Distributions*, 31 AKRON L. REV. 175, 186–95 (1997).

[48] *See* Berg Chilling Sys. v. Hall Corp., 435 F.3d 455, 462–65 (3d Cir. 2006) (discussing differences in successor liability under New Jersey and Pennsylvania law; also noting variations in other states).

targets is a separate, if related question. If the importance of corporate law is generally a key factor in forum selection, but Delaware courts are not particularly good at it, then deal lawyers in publicly company deals can be expected generally to choose a forum for dispute resolution that matches the target's state of incorporation when the target is a public company, but not otherwise. This would still lead to dominance by Delaware, since most public companies are incorporated in Delaware, but the key fact would be the match of forum and target incorporation public company deals. But if Delaware courts are particularly expert in resolving corporate law disputes, and courts elsewhere—even courts in the target's state of incorporation—are not particularly expert in corporate law, even of their own state, then the tendency of forum to match the target's state of incorporation in public target deals would be limited to Delaware.

Two competing versions of the Coates-Kahan hypothesis follow:

Alternative Hypothesis 1b1.	Courts in the target's state of incorporation will be chosen as forum for dispute resolution more often in public target bids than in private target bids.
Alternative Hypothesis 1b2.	Delaware courts will be chosen as the forum for dispute resolution in bids for public targets incorporated in Delaware more often than in private target bids, or in bids for public targets incorporated elsewhere.

C. Deal Structure

A second consequence of ownership dispersion bearing on forum selection concerns deal structure. Some deal structures (mergers, tender offers) offer a way to acquire the stock of dispersed ownership efficiently. Other deal structures (asset purchases, stock purchases) do not. Publicly held targets tend to be acquired through the former deal structures, privately held targets are more often acquired through the latter deal structures,[49] so that deal structure, too, should correlate with Delaware forum selection, in part by mediating the effects of ownership dispersion.

But even among private target deals, deal structure should correlate with Delaware as a forum for two additional reasons. First, asset purchases do not require any particular corporate law mechanism to function. Mergers, by contrast, do require reliance on corporate statutes. A merger is as much a creature of statute as a corporation itself. The same is true of reverse stock splits. Moreover, a merger is coercive, as is a reverse stock split. That is,

[49] *See* Coates, *Powerful and Pervasive Effects*, *supra* note 1.

shareholders who vote against a merger can be forced to accept merger consideration provided the required number (usually a majority) of shareholders approve the merger. Coercion can generate conflict; conflict in the corporate context results in shareholder lawsuits, based either on fiduciary duties or, if available, appraisal statutes, or based on special disclosure obligations imposed in the merger context. In short, M&A bids structured as mergers interact more strongly with corporate law than bids using other deal structures. In addition, the well-regarded courts in Delaware are the *Chancery Courts*, which have no general jurisdiction over asset purchases. Delaware courts other than the Chancery Court have no special reputation or advantage over courts in other states.

Stock purchases fall somewhere between mergers and asset purchases. They do not rely on coercive, potentially conflict-generating corporate law rules, but they do draw on the basic stock-ownership characteristic of the corporate form, and related corporate law, in a way that asset purchases do not. Moreover, Delaware Chancery Courts do have general jurisdiction over stock purchases.

Two related empirical implications of the Coates-Kahan hypothesis follow:

Hypothesis 2. Deals structured as asset purchases will be least likely to specify the target's state of incorporation as the forum for dispute resolution.

Hypothesis 3. Deals structured to include a merger will be more likely to specify Delaware as the forum for dispute resolution than deals structured in other ways.

D. The Role of Lawyers in Designating Choice of Forum

In addition to reasons drawn from the economics of dispersed ownership, DMPs may be influenced by the economics of the agents (lawyers) of the parties to an M&A transaction. Legal services are largely a credence good,[50] for which service providers (lawyers) have a fair amount of autonomy in diagnosing and recommending certain choices by clients, even sophisticated corporate clients, particularly in respect to the most "legal" aspects of a contract, such as DMPs. Even if market pressures constrain lawyers from pursuing their own ends in making recommendations to clients, those pressures are likely to be weak at best, given the inability of observers to know precisely why a given contract term was chosen, and whether it was the lawyers, or the client, who ultimately was responsible for the choice.

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[50] *See* Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 Md. L. Rev. 869, 889 (1990) (discussing legal services as a credence good).

As a result, one can expect two kinds of lawyer-related influences on DMPs. First, some choices may reflect differing levels of M&A experience and expertise, which vary across lawyers and law firms. Some law firms may be more likely to select a given court for reasons having nothing to do with the interests of the parties, and more to do with their own familiarity with the court. Second, other choices may produce private benefits for lawyers. Selection of a particular court might be more likely to result in litigation, which could benefit the lawyers involved, if they are partners in a firm that also provides deal-related litigation services. These choices may not be consciously made against client interests, if there are good faith reasons (such as those described above) that the courts involved are attractive for other reasons.

Specifically, in regard to the choice of forum, law firms that have a great deal of experience working for public companies are more likely to provide services to Delaware companies, have expertise in Delaware law, and be familiar with Delaware courts. The reverse is also likely to be true: because most private companies are not incorporated in Delaware, law firms that work on a large number of primarily private target deals are less likely to designate Delaware courts.

Hypothesis 4. Delaware is less likely to be chosen by law firms that handle a large number of private target deals.

E. Arbitration

What about other potential forum choices? As just noted, asset purchases are not subject to the jurisdiction of the Delaware Chancery Courts, and others involve companies with no Delaware contacts. Suppose a given M&A transaction does not involve a public company, so there is no strong corporate law reason to think Delaware courts particularly expert in resolving potential disputes. How might deal lawyers obtain some of what are thought to be benefits of Delaware courts—speed, the absence of juries, or expert adjudicators—when there is no particular reason to choose Delaware?

Arbitration is one possibility. Arbitration also has the powerful advantage of generally being cheaper than litigation in court. Arbitration also might be attractive to a foreign bidder, which would reasonably worry that courts in any particular US state might favor the domestic party in a dispute with the foreign bidder. Other advantages of arbitration in other contexts, such as the lack of discovery, would seem to be less important in the M&A context, because corporate litigants are less likely to share information with the media or other potential plaintiffs than might be the case in consumer contracting.

However, as noted in Part I, arbitration suffers from some drawbacks. For example, there is a widely held view that it often results in "split deci-

sions," or "compromise verdicts," which not be attractive in some contexts to either party to an M&A deal. Arbitration decisions can also generally be appealed only on limited grounds. Both compromise verdicts and reduced appeal rights mean that arbitration decisions can be expected to be less "accurate" (measured against some theoretical best legal outcome) than other decisions. As deal and dispute size rise, these disadvantages will become more important relative to the cost advantages of arbitration.

Together, these factors suggest the following hypotheses:

Hypothesis 5. Arbitration will be less common in public target deals (for the reasons that choice of the target's state of incorporation is attractive).

Hypothesis 6. Arbitration will less common in large deals.

Hypothesis 7. Arbitration will be more common in cross-border deals.

A final reason for arbitration in bids for private targets is that price adjustment clauses seem to be tailored for specialized arbitration by auditors. Unlike corporate law issues, price-adjustment disputes focus to a large extent on what are essentially accounting disputes: whether working capital has been measured correctly, or whether inventory was valued correctly. While accounting issues are not always easy, they are typically more "rule-like" than legal issues such as those common to fiduciary duty disputes, or to claims of fraud or disputes requiring contract interpretation. Even the most expert courts are unlikely to do a better job of resolving disputes of this kind than specialized auditor-arbitrators. In the context of these clauses, even very large deals may benefit from arbitration, since it is unlikely that there will be any improvement in the outcome from an appeal to a non-specialized court. This suggests a final arbitration-related hypothesis:

Hypothesis 8. Arbitration will be common in contracts containing price-adjustment clauses, even in large deals, but will be limited to disputes over those clauses.

F. The "Puzzle" of No Designated Forum

As noted by E&M, some M&A agreements leave out any designated forum for dispute resolution, presenting an apparent puzzle. What explains the absence of a forum selection clause in M&A agreements? One hypothesis is transaction costs. Perhaps some deals are too small to bother with fine-tuning. Deal size no doubt plays a role in determining how much lawyer time can be cost-effectively devoted to contract advising, drafting and negotiation. This leads to a simple hypothesis:

Hypothesis 9. The absence of a forum selection clause will be less common in larger deals.

However, it is unclear whether costs alone can explain the absence of forum selection clauses, since—if there were a generally agreed-upon best forum (or small set of best fora), then it would be inexpensive to rely upon boilerplate to designate that forum (or one of those fora). A more refined version of this hypothesis—similar to the conjecture in C&D[51] is that a forum selection clause may be unnecessary, and if it imposes more than trivial costs to negotiate, it would be simpler to leave it out. Thus, if both bidder and target are located or incorporated in the same state, such that no other court system would have jurisdiction over deal-related disputes, there would be no reason to designate the courts of that state for dispute resolution.[52]Thus, this version of a transaction cost hypothesis would posit that a court would be chosen less often if both bidder and target were based in a single state.

Alternative Hypothesis 10a. The absence of a forum selection clause will be *less* likely if the bidder and target are incorporated or headquartered in different states.

Another hypothesis is bargaining breakdowns. Some (but not all) bidders and targets may systematically disagree about which forum to select, and risk a bargaining breakdown if they each insist on their preferences. The parties then purposefully leave a forum selection clause out to avoid a deal-killing disagreement. In particular, geographic contacts for the bidder and target may give rise to different interests in seeking to litigate disputes in different court systems. For example, a dispute between a California-based bidder and a New York-based target could be litigated in either California or New York, making advance specification of a forum for dispute resolution more contentious. Or to put the other way around, if a bidder and target were both based in New York, it seems more likely that the contract would designate New York as the forum than to leave the forum open. This would lead to the opposite of the transaction cost hypothesis:

Alternative Hypothesis 10b. The absence of a forum selection clause will be *more* likely if the bidder and target are incorporated or headquartered in different states.

A third hypothesis derives from the economics of agency costs. It is possible that inexperienced deal lawyers do not think about the issue. Experienced deal lawyers—which are also lawyers who specialize in M&A—maintain or seek out and use good boilerplate templates for their contracts. Even if including a forum selection clause is cheap and simple for experienced lawyers, it may not even occur to inexperienced lawyers to include

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[51] *See* Cain & Davidoff, *supra* note 5, at 17–18.
[52] *Id.*

one and if they do not maintain good contract boilerplate templates, they may leave such a clause out inadvertently.

Hypothesis 11. The absence of a forum selection clause will be more likely if the law firms involved have less experience in M&A.

G. Specific Performance Clauses

The type of DMP given least attention in prior research are clauses designed to increase the odds that a court will grant specific performance in the event of an attempted breach. At the outset, it should be noted that such clauses differ from other DMPs in one legal respect: they attempt to direct a court to use a choice of remedy that is, as a matter of equity, ultimately a matter of judicial discretion, and one that cannot be determined by the parties alone, since the traditional doctrinal test for specific performance entails consideration of interests other than the parties, such as practicality and the costs that a non-damage remedy will impose on the court system.[53] Nevertheless, one aspect of the test for specific performance is whether the parties have an adequate remedy at law (i.e., an adequate damage remedy), and courts seem willing to take at face value contractual stipulations that conventional damages will not be adequate.[54]

When can we expect specific performance clauses to be included? Specific performance clauses are likely to be most important in deals for public targets. That is because damage remedies in public target deals are likely to be unavailing, whether for bidder or target. For bidders, if the target has breached a representation or covenant, the bidder's only meaningful remedy will typically be to refuse to close. Post-closing, a public target's shareholders are dispersed, making enforcement of judgments against them intractable in most deals.[55] If a target breaches by refusing to close on some pretext, a bidder will find it difficult to prove damages with any certainty, since the value of the deal will exist in "synergies" (cost savings or revenue enhancements) that can only come post-closing, as a result of operational changes by

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[53] *See* Niagara Mohawk Power Corp. v. Graver Tank & Mfg. Co., 470 F. Supp. 1308, 1324 (N.D.N.Y. 1979) ("Courts of equity are reluctant to grant specific performance in situations where such performance would require judicial supervision over a long period of time.").

[54] *See, e.g.*, Hexion Specialty Chem., Inc. v. Huntsman Corp., 965 A.2d 715 (Del. Ch. 2008) (granting specific performance of all covenants of bidder save obligation to close, in accordance with court's interpretation of the contract, and not engaging in any analysis as to whether the target in fact had an adequate remedy at law, or what standard should apply in deciding whether to grant specific performance). *But cf.* El Paso Natural Gas Co. v. Transamerican Nat'l Gas Corp., 669 A.2d 36 (Del. Ch. 1995) (jurisdiction cannot be conferred on the Court of Chancery by contract or agreement).

[55] See Coates, *Powerful and Pervasive Effects*, *supra* note 1, for reasons and evidence on this point.

the bidder that at the time of breach will remain in the future, and be subject to many contingencies.

For public targets, a threatened breach by the bidder also usually involves the refusal to close. In few public target deals are target shareholders paid with earn-outs, debt consideration subject to set-off, or other significant post-closing payments, on which the bidder could renege.[56]As with the bidder, a public target will have a hard time proving damages from a threatened refusal to close by the bidder. This is because the damages involved—the deal consideration less the value of the target prior to the deal, effectively equal to the deal premium—requires valuing the target (and if the consideration is stock, also requires valuing the bidder). While market prices may provide a means to value the target in normal circumstances, a bidder accused of breach will typically argue that it is the target that has breached, which explain the bidder's refusal to close,[57]so the target's market price is based on imperfect information, making it a poor means to value the target.[58] In addition, the harm to the target from breach may exceed the deal premium, because the breach may lead the market (including investors, creditors, customers, and suppliers) to believe that the bidder found some problem with the target and that was the true cause of the breach, resulting in further harm to the target's franchise. Finally, some courts have ruled that a target may not sue for the deal premium, because it would have been paid to target shareholders, not to the target, and because the agreement contained a no-third-party beneficiaries clause. Courts have also ruled that target shareholders (who were not formally parties to the agreement) could not sue either, leaving the bidder's breach without remedy, but for provable out-of-pocket reliance damages to the bidder.[59]

In private target deals, by contrast, the target (or its shareholders) typically provides meaningful post-closing indemnification commitments to the bidder, making damage remedies the natural means to address breaches by

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[56] *See id.*

[57] *See, e.g.*, In re IBP Shareholders Litig., 789 A.2d 14 (Del. Ch. 2001) (bidder refused to close, claiming a material adverse change and breach of representations; court declined to find a material adverse change and specifically enforced contract).

[58] Liquidated damage clauses might be another way to cope with the difficulty of proving damages, but such clauses are not commonly found in M&A agreements. Break fees and reverse break fees, which are similar, are found, and increasingly so, in many M&A deals, but such fees are typically payable upon specified termination events (for example, if the deal is topped by a third party, or if it has not been closed after a specified amount of time due to the failure to obtain regulatory approvals or financing), rather than serving as a general remedy for breach of the covenant to close by the buyer. Such fees are most commonly found in deals in which private equity funds, or affiliated "shell" companies, are the bidders, primarily to address the optionality that buyout deals have always provided the bidder/sponsors. On break fees, see Coates &Subramanian, *Buy-Side Model*, *supra* note 41; *see also* John C. Coates IV, *M&A Break Fees: US Litigation vs. UK Regulation* (Harvard Law School Public Law & Legal Theory, Working Paper No. 09-57, 2009), *available at* http://ssrn.com/abstract=1475354. *See* Afra Afsharipour, *Transforming the Allocation of Deal Risk Through Reverse Termination Fees*, 63 VAND. L. REV. 1161 (2010) (discussing reverse break fees).

[59] *See* Consol. Edison v. Ne. Utilities, 426 F.3d 524 (2d Cir. 2005).

the target, rather than a refusal to close by the bidder. Such deals are subject to fewer contingencies, take less time, and often can be closed simultaneously with the signing of the contract, making pre-closing breach by the target less of a problem for buyers. For both targets and bidders, the more typical breach scenario is not pre-closing refusal to close. For bidders, the typical breach scenarios are actions that reduce the value of the deal to the bidder, which can be remedied with damages; and for targets, the typical breach scenarios are refusal by the bidder to pay post-closing contingent consideration, which again can be remedied with damages.

In sum:

Hypothesis 12. Specific performance clauses will be more common in public target deals.

The risks of non-consummation, and of damage remedies falling short, moreover, will straightforwardly increase with bid size, as larger deals typically involve larger uncertainties in valuation, or knock-on effects from refusal to close. Thus:

Hypothesis 13. Specific performance clauses will be more common in larger deals.

Finally, drawing on the legal agency cost discussion above, one can expect that law firms with little deal experience may not recognize the foregoing risks, particularly for law firms with little public deal experience.

Hypothesis 14. Deals involving law firms with little deal experience, particularly little public target deal experience, will be less likely to include specific performance clauses.

III. Evidence on DMPs in M&A Contracts

The foregoing hypotheses are tested using two datasets. One sample consists of randomly chosen control bids for US targets in 2007-2008 (the *control bid dataset*). These bids are initially drawn from Thomson Financial's M&A database, as described below, but consists primarily of hand-coded data taken from SEC filings and the relevant M&A contracts, as well as data from Compustat for publicly held companies. A second sample consists of data on the M&A experience of the law firms who worked on the control bid sample, based on their appearances in Thomson Financial's M&A database in the period 2000-2006 (the *law firm dataset*).

A. Construction of Control Bid Dataset

The control bid dataset begins with all control M&A bids, i.e., where the bidder seeks to own at least 50% of the target, reported in Thomson as

being announced in 2007 or 2008. That sample is narrowed to bids for which a bid value is included, and further narrowed to targets lacking a reported stock price in Thomson, consistent with the targets being privately held (i.e., not SEC registered), which (for the subset analyzed below) is verified by reference to SEC filings. That subset is further narrowed to eliminate bidders owning more than 20% of the target's stock, to allow a focus on arm's-length transactions. The remaining bids (n=5,613) are divided into those involving publicly held bidders (n=3,315) and privately held bidders (n=2,298), again using stock price data in Thomson as an indicator of publicly held status. Bids with no reported effective date and no reported withdrawal date (i.e., are still pending, according to Thomson) are dropped, leaving 2,743 bids.

Those bids are then reviewed to compare the ratio of target assets to bidder assets as reported by Thomson. This ratio should roughly predict the probability a given bid includes an M&A contract filed with the SEC, because SEC rules require public bidders to file all "material" contracts as an exhibit to a Form 8-K (or Form 10-Q or 10-K).[60] Bids with a ratio in excess of 20% (n=108) are then reviewed in alphabetical order, and where a deal contract is found in the SEC's EDGAR system, near in time to the reported bid announcement date, the bid is retained, and otherwise dropped.[61] Additional bids meeting the above criteria were reviewed until a sample of 60 arm's-length, resolved control bids for privately held US targets announced in 2007 and 2008 for which M&A contracts were on file with the SEC was generated.

Next, each of these private target control bids was matched with a control bid for a publicly held US target. For each private target bid, a corresponding public target bid was chosen in which the public target's industry was as similar to the private target as possible, based on SIC codes, and, where there were more than one same-industry bid from which to choose, as close as possible in bid size. Each public target's SEC filings were reviewed near in time to the bid announcement date to verify that the deal agreement was filed. The public company status of the target was v erified—again, Thomson misclassifies a large number of bids as involving public targets that either never were public or had "gone dark" before the bid. Hostile and unsolicited bids were dropped (including many not so classified by Thomson) unless they resulted in an eventual deal agreement.

Finally, each deal agreement in the sample was reviewed and coded twice, first by research assistants, and then by the author, with any intercoder mismatches being reviewed again by the author. The name of each

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[60] While the law determining "materiality" is complex, a bid involving a target with assets that exceed 20% of the bidder's assets is likely to be "material," and in any event is separately required to be disclosed. *See* SEC Regulation S-X, 17 C.F.R. § 249.308 (defining "significant" acquisitions).

[61] Six bids were dropped because no agreement could be found; two were dropped because Thomson misreported bidder ownership and were freezeout transactions, rather than arm's-length bids; and one was dropped because the target was in fact a public company.

target, bidder, bid announcement date, and a link to each deal agreement are contained in Appendix B.[62] By construction, this sample is representative not of arm's-length control bids overall, nor of arm's-length control bids for US targets, but of arm's-length control bids for privately held US targets that were large relative to the size of the publicly held bidders, as well as arm's-length control bids for publicly targets of the same size and in the same industries. These constraints were necessary to generate a dataset for which M&A agreements could be found on file with the SEC, since privately held companies do not file documents with the SEC, and since even where a publicly held bidder is involved, an M&A contract will not be filed unless the related transaction is material to the bidder. Nevertheless, this dataset is (to my knowledge) the most representative random sample of M&A contracts for privately held US targets for the period that has been assembled and made publicly available.

B. Detailed Analysis of Size-Matched and Industry-Matched Sample of Control Bid Dataset

As shown in Appendix C, the two samples consist of bids that, at the median of bid size, are statistically indistinguishable. The median difference in bid size across matched pairs of bids is $5 million, roughly 7% of the median bid. More than 60% have exact four-digit SIC industry matches, nearly all are matched by one-digit SIC code, and all are in the same five-industry Fama-French classification, even when breaking out finance separately as a sixth industry. Overall, the matches appear to produce a sample in which size and industry are largely eliminated as independent sources of variation in M&A practices, leaving ownership (and other factors) as potential causes of observed variation.

C. Construction of Law Firm M&A Dataset

The law firm dataset begins with the Thomson Financial M&A database for all bids announced in the period 2000–2006. Each law firm involved in any bid in that database was extracted, along with the size of the bid and the SEC status (public or private) of the target. For each law firm, the number of bids was counted, and dollar volume of those bids was summed, and then broken down by target SEC status and whether the law firm represented the target or the bidder. Two of these counts and sums are used as empirical proxies for the M&A experience of the law firms in the regression analysis below: *ALLLAWSUM*, which is the sum of the deal value of all of the deals on which the law firm worked from 2000 to 2006 as reported in Thomson, which represents the overall M&A experience of the law firm, and *BIDDER_PRIV_COUNT*, which is the count of the private target deals on which

[62] *See* Appendix B.

a law firm representing a bidder in the control bid dataset was reporting as having worked from 2000 to 2006 in Thomson, which represents the private-target deal experience of a given bidder law firm.[63] A dummy variable is also constructed from these variables: *NEWBIE_LAW_PUBLIC*, equal to one if the law firm was reported as having worked on less than $1 million deal value of public target deals from 2000 to 2006, representing law firms that might have some M&A experience but little experience on public target deals.

The law firm experience counts and sums are noisy. They consist only of M&A transactions for which Thomson includes law firm information, which is only a subset of the overall M&A population. Thomson, for example, frequently omits law firm information, particularly in transactions between private companies. In addition, many M&A transactions—particularly those of a small size—are omitted from Thomson altogether. Nevertheless, these counts and sums are reasonable proxies for M&A experience: law firms have an incentive to inform Thomson about their involvement, since "league tables" based on this database are frequently publicized in media reports, which can be expected to generate additional business for the law firms.

D. Summary M&A Data

Table 1 presents summary data on the M&A bids analyzed below, the companies involved in the bids, and the law firms identified in the contracts related to the bids.

As seen in Table 1, M&A transactions for US targets vary strikingly in size, ranging from very small bids (under $1 million) to mega-deals (over $20 billion). The distribution of bid sizes is skewed, with a mean bid over nine times larger than the median. The vast majority of bids (93%) are completed, with all of the uncompleted bids involving public targets, as shown in Table 3 below. A small but substantial fraction (13%) involves a foreign bidder (i.e., they are cross-border deals). Most (77%) involve bidders headquartered in one US state buying a target headquartered in another state, and most (61%) also involve bidders and targets incorporated in different states. A sizeable number (38%) involve a target operating in a completely different industry than the bidder.

To proxy for the importance of corporate law considerations in potential contract disputes, bids are classified based on deal structure, into four mutually exclusive categories: asset purchases (13%), stock purchases (24%), and mergers (50%), a category that includes two-step bids that commence with a

[63] The sum of deal value is used for M&A experience overall, since deals involving larger deal values are likely to attract more legal and client attention, on both sides of the deal, and justify greater investment in deal technology and learning. The count of deals is used for private target M&A experience because deal values are not reported in Thomson (or elsewhere) for the vast majority of private target deals.

Table 1: Summary Statistics

Full Sample (2007–08) (n=120 unless noted)	Mean or % positive	Median	St. dev.	Min	Max
Panel A. Bid characteristics from control bid dataset					
Bid value ($mm)	555.6	62.4	2103.4	0.5	20168.3
Completion rate	92.5%	—	—	0	1
Cross-border bid	13.0%	—	—	0	1
Out-of-state bid (HQs of parties)	76.7%	—	—	0	1
Cross-jurisdictional bid (incorporation of parties)	60.8%	—	—	0	1
Diversifying bid (1-digit SIC mismatch)	37.5%	—	—	0	1
Asset purchase	13.0%	—	—	0	1
Stock purchase	24.0%	—	—	0	1
Merger (including tender/merger)	50.0%	—	—	0	1
All cash consideration	59.2%	—	—	0	1
Panel B. Bidder and target characteristics from control bid dataset					
Bidder assets ($mm) (n=89)	20095.2	203.7	165507.7	0.1	1562147.0
Target incorporated in Delaware	46.7%	—	—	0	1
Bidder incorporated in Delaware	51.7%	—	—	0	1
Bidder headquartered in US	87.0%	—	—	0	1
Target headquartered in US	100.0% (by construction)		—	0	1
Target public (SEC registered)	50.0% (by construction)		—	0	1
Panel C. M&A experience from law firm dataset of law firms in control bid dataset					
Value, all bids ($Bn)	220.8	31.7	370.9	0	1787.9
Number, all bids	353.7	190.5	461.6	0	1956
Value, public targets only ($Bn)	155.0	17.4	284.7	0	1448.4
Number, private targets only	148.9	15.5	285.2	0	1579
Firms with <$1 MM public target bids	25%	—	—	0	1

tender offer and a merger to freezeout the target shareholders remaining after the merger. The small residual category of deal structures (13%) consist of tender offers followed by reverse stock splits, and stock purchases followed by freezeout mergers. Most (59%) of the deals are for all cash consideration.

Buttressing the plausibility of the law-firm related hypotheses (4, 11 and 14), 7% of the sample contracts contained clear errors. These errors included provisions that conflicted with one another, provisions that cross-referenced sections of the contract that did not exist, and provisions that used defined terms that were not defined in the contract. This 7% is a lower bound on errors in the contract, for two reasons. First, neither the author nor the researchers attempted to find the errors—they simply emerged as a result of coding the contracts for the provisions summarized above. Second, only clear errors were coded as errors—other kinds of errors (e.g., omissions, poorly worded sentences, unnecessary ambiguities, etc.) were not counted. The 7% lower bound on clear errors is consistent with a similar error rate found incidentally in *Explaining Variation in Takeover Defenses: Blame the Lawyers.*[64]

The average law firm identified in the contracts in the control bid sample worked on 354 transactions in the years 2000 to 2006 involving $220

[64] *See* John C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CALIF. L. REV. 1301 (Oct. 2001).

billion.[65]The two law firms with the most appearances in the control bid dataset were Skadden (eight deals in the control bid dataset), which worked on 816 deals reported in Thomson for 2000 to 2006 involving over $800 billion, and Latham (seven deals in the control bid dataset), which worked on 812 deals in Thomson for 2000 to 2006 involving over $275 billion. The distribution of M&A experience, however, is highly skewed: averages are typically nine to ten times larger than medians, reflecting a small number of law firms that handle a large volume of M&A transactions. Also buttressing the law-firm-related hypotheses is the fact that in fully one fourth of the control bid sample one of the companies relied on either no law firm or a solo practitioner or a law firm that had worked on less than $1 million worth of public target deals from 2000 to 2006.

In eleven deals (9%), one of the parties identified no outside law firm in the M&A contract, including seven bidders (6%) and four targets (3%). In addition, a sizeable share of deals in the sample designated solo practitioners (seven deals, or 6%), or designated law firms that had little or ***no*** reported deal experience in the 2000–2006 period: 16% of the targets and 12% of the bidders (this is exclusive of sample companies that did not designate an outside law firm). Because Thomson's database is far from complete, these data do not mean that the law firms actually had only that little M&A experience over that period. But these firms are likely to have had significantly less experience than firms at the opposite end of the M&A experience spectrum, such as Skadden and Latham. Finally, contracts involving such "newbie" law firms had twice the error rate as that of other sample contracts—again, consistent with the theory behind the law-firm-hypotheses.

E. Summary Data in States of Incorporation and Headquarters of the Parties

Table 2 presents summary data on the parties' headquarters and states of incorporation.

Roughly half of both targets and bidders are incorporated in Delaware, in line with Delaware's overall share of publicly incorporated companies in the US.[66] The only state besides Delaware accounting for more than 5% of targets' states of incorporation is Nevada, which competes with Delaware.[67] Only 119 jurisdictions of incorporation are reflected in the above table: in

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[65] See Appendix D for a list of the law firms and their number of appearances in the control bid dataset.

[66] *See* Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559 (2002); *see also* Marcel Kahan, *The Demand for Corporate Law: Statutory Flexibility, Judicial Quality, or Takeover Protection?*, 22 J.L. ECON. & ORG. 340 (2006).

[67] *See* John Chavez, *Mesa Airline Move to Nevada Sparks Debate on Tax Burdens*, Albuquerque J., Apr. 29, 1996, Business Outlook at 2 (discussing corporate income-tax advantages to holding companies that incorporate in Nevada);*see also* Marcel Kahan and Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205 (2001), at n. 75 ("Nevada . . . actively competes for incorporation by certain holding companies").

Table 2: State of incorporation and headquarters of parties to M&A contracts, 2007–2008

Bidder State of Incorporation (n=119)		**Bidder Headquarters Location (n=120)**	
Delaware	52%	Foreign	13%
Foreign	12%	New York	11%
Nevada	8%	California	10%
Other US Jurisdictions	28%	Texas	10%
		Florida	5%
		Illinois	5%
		Other US Jurisdictions	47%
Target State of Incorporation (n=119)		**Target Headquarters Location (n=120)**	
Delaware	47%	California	14%
Nevada	5%	Texas	12%
Other US Jurisdictions	48%	Florida	8%
		New York	8%
		Virginia	7%
		Other US Jurisdictions	51%

Notes
No state other than those listed accounted for more than 5% of the sample in any category.
The sample consists of deals with US targets only.

three deals, the "target" consists of multiple, commonly controlled targets, including one deal in which the targets are incorporated in more than one state, and in another deal, the bidder is an individual. One bidder and one target, each are national banks.

More bidders are incorporated outside of the US (12%) than in any non-Delaware state. The foreign jurisdictions with more than one bidder are Canada (three), India (two), Italy (two), and South Korea (two). One bidder each is organized in the British Virgin Islands, the Cayman Islands, the Philippines, South Africa, and the United Kingdom.

Headquarters locations are far less concentrated, with foreign-based bidders outnumbering bidders in any given US state. (The sample consists solely of US targets.) New York is the most common headquarters location for bidders (11%), nudging out California and Texas (10% each). California is the most frequent location for targets (14%), just ahead of Texas (12%). For companies incorporated outside of Delaware, headquarters location correlates strongly for both bidders (0.79) and targets (0.68). One bidder is headquartered in Puerto Rico.

F. Summary Data on DMPs, Overall and by Target Ownership

Table 3 presents summary data on DMPs, and also compares incidence of DMPs across public and private target M&A deals. As can be seen, DMPs are quite common in M&A transactions, but also vary significantly in their incidence, ranging from 11% (for whole contract arbitration) to 52% for jury waivers, 75% for specific performance clauses of some kind, to 83% for arbitration of price adjustment disputes, conditional on a price adjustment clause.

Table 3: Full Sample and Size-Industry Matched Subsamples, M&A Transactions Announced 2007–2008

	All Targets (Full sample)	Public Target Subsample	Private Target Subsample	P-value of t-test, Wilcoxon test, or F-test
	n = 120	n=60 unless noted		
Dispute resolution				
Delaware as choice of law	38%	55%	22%	0.00
No choice of law clause	0%	0%	0%	n.m.
Delaware courts as forum	28%	47%	8%	0.00
No choice of forum clause	23%	20%	27%	0.20
ADR for entire contract	11%	2%	20%	0.00
ADR for price (if price adjustment clause used)	83% (n=39)	25% (n=4)	89% (n=35)	0.00
Jury waiver	52%	55%	48%	0.47
Jury waiver (if not DEas forum or ADR)	52% (n=74)	42% (n=31)	58% (n=43)	0.09
Remedies for breach				
Target indemnification of bidder	47%	7%	87%	0.00
General agreement to specific performance	61%	73%	48%	0.00
Specific performance for bidder only	8%	8%	7%	0.36
Specific performance for non-compete only	6%	0%	12%	0.00
Does not address specific performance	26%	18%	33%	0.03

In most cases, bids for public and private targets are strongly different, such that the p-values of t-tests (or, where appropriate, Wilcoxon tests or F-tests) are highly statistically significant. Arbitration is specified to govern the entire M&A contract ten times as often (20%) in private bids than in public bids (2%), and price adjustments are common (67%) in private bids, but uncommon in public bids (7%). Where the deal contracts include price adjustment clause, arbitration is nearly ubiquitous in private bids (89%), but not standard in public bids (25%).

Target indemnification is very common in private target bids (87%), but rare in public target bids (7%). A general clause providing for specific performance is more common in public target bids (73%) than in private target bids (48%), but specific performance relating to non-competition or equivalent clauses only are limited to private target bids (12%) and are not found in public target bids. Jury waivers and specific performance clauses in favor solely of bidders, by contrast, are about as common in public and private bids, even after dropping bids choosing arbitration or Delaware courts (where a jury waiver should be unimportant).

IV. Choice of Law and Forum

In this Part, the sample described above is analyzed to see how if two of the major types of DMPs—choice of law clauses and forum selection

clauses—are related to other observable characteristics of bids, bidders and the law firms involved. More specifically, two questions left unresolved in prior empirical articles on this topic (see Part I) will be explored in some detail: (1) when and why is Delaware chosen as a forum in M&A contracts, and (2) why do sophisticated parties to some M&A contracts fail to designate a forum for dispute resolution altogether?

A. Detailed Data on Choice of Law and Forum

Table 4 presents more detailed data on the choice of law clauses and forum selection clauses in the full sample of 120 M&A bids.

Table 4: Law and fora designated in random sample of M&A contracts, 2007–2008

Choice of Law (n=120)		**Choice of Forum (n=120)**	
Delaware	38%	Delaware	28%
New York	22%	New York	13%
Texas	7%	AAA	8%
Nevada	5%	Texas	7%
California	3%	Other States	23%
Other States	33%		
None	0%	None	23%

Notes
No state or forum other than those listed accounted for more than 1% of the sample.

As can be seen from Table 4, all of the contracts specified a choice of law, as in E&M.[68] However, 23% of the contracts did not designate a forum for dispute resolution—considerably lower than in E&M (who report 47% did not designate a forum),[69] but greater than the 14% reported in C&D,[70] and still a puzzle, as E&M note:

> Given that the parties could easily select the forum as well as the applicable law—and given that the forum selected can sometimes be as important (if not more important) than [sic] the law chosen—the frequent failure of the parties to specify a forum for resolution of disputes presents a theoretical puzzle.[71]

The puzzle of the missing forum selection clauses is explored more in Part IV below.

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[68] Eisenberg & Miller, *Ex Ante Choices*, *supra* note 4, at 1981.
[69] *Id.*
[70] *See* Cain &Davidoff, *supra* note 5, at 106.
[71] Eisenberg &Miller, *Ex Ante Choices*, *supra* note 4, at 1981.

Arbitration with the American Arbitration Association is chosen as the forum for dispute resolution more often than any state other than Delaware or New York. As in E&M, there is a high correlation between choice of law and forum (0.52, $p<0.000$).[72] Less strong, but still statistically significant, are the pairwise correlations between target state of incorporation and both choice of forum and choice of law, and between target headquarters and each choice (see Table 5).

Table 5: Pairwise correlations (p-values in parentheses) (bold = stat. sig. at 95+%)

	CL	CF	TI	TH	BI
Choice of law (CL)					
Choice of forum (CF)	**0.52 (0.00)**				
Target incorporation (TI)	**0.43 (0.00)**	**0.39 (0.00)**			
Target headquarters (TH)	**0.27 (0.00)**	**0.23 (0.01)**	**0.39 (0.00)**		
Bidder incorporation (BI)	0.02 (0.80)	–0.02 (0.81)	0.01 (0.90)	–0.05 (0.61)	
Bidder headquarters (BH)	0.16 (0.07)	0.10 (0.26)	0.12 (0.21)	0.17 (0.07)	**0.50 (0.00)**

As in E&M and C&D, Delaware is—overall—the most common choice for both law and forum, followed by New York.[73] No other state is chosen more than 10% of the time for either clause. However, from Table 3 above, one can also see that there are large differences between M&A choice of law and forum selection clause preferences between public and private target bids. When the target is public, Delaware law is chosen 55% of the time, and Delaware courts are chosen 47% of the time. When the target is private, Delaware law is chosen 22% of the time, and Delaware courts are chosen 8% of the time. In addition, Table 5 shows that the target's state of incorporation and its headquarters also correlate with both choices, and with each other. Before drawing any conclusions about the relative attractiveness of Delaware or other states for contract designations for law or forum, these relationships need to be explored more carefully.

A. Relationships Among Choice of Law and Forum, Target Incorporation, Target Ownership, and Deal Structure

To see whether the differences in the success of Delaware courts in attracting M&A contract designations are attributable to differences in target states of incorporation, or to differences in deal structure, which "The Powerful and Pervasive Effects of Ownership on M&A"shows are also correlated with target ownership, Table 6 breaks out these choices in a set of n-x-n matrices.[74]

As shown in Panel A of Table 6, Delaware courts retain a large share (75%) of M&A contract designations when the targets are public *and* incor-

[72] *Id.*
[73] *Id.* at 1987; Cain & Davidoff, *supra* note 5, at 106.
[74] *See* Coates, *Powerful and Pervasive Effects*, *supra* note 1.

Table 6: Choice of Forum for Dispute Resolution, by Target State of Incorporation, Public Status and Deal Structure

Panel A. Choice of Forum by Target State of Incorporation and Public Status

	All targets (n=120)		Public targets (n=60)		Private targets (n=60)	
Forum	Delaware incorporation	Other incorporation	Delaware incorporation	Other incorporation	Delaware incorporation	Other incorporation
Delaware court	29 (52%)	4 (6%)	24 (75%)	4 (14%)	5 (21%)	0 (0%)
Other court	18 (32%)	32 (50%)	6 (19%)	13 (46%)	12 (50%)	19 (53%)
Arbitration	1 (2%)	8 (13%)	0 (0%)	1 (4%)	1 (4%)	7 (19%)
Not specified	8 (14%)	20 (31%)	2 (6%)	10 (36%)	6 (25%)	10 (28%)

Panel B. Choice of Forum by Deal Structure and Target State of Incorporation for Private Targets

	Private targets (n=60)					
	Asset purchase (n=16)		Stock purchase (n=24)		Merger (n=20)	
Forum	Delaware incorporation	Other incorporation	Delaware incorporation	Other incorporation	Delaware incorporation	Other incorporation
Delaware court	0 (0%)	0 (0%)	1 (13%)	0 (0%)	4 (44%)	0 (10%)
Other court	3 (43%)	5 (53%)	4 (50%)	10 (63%)	5 (55%)	4 (36%)
Arbitration	1 (14%)	1 (11%)	0 (0%)	3 (19%)	0 (0%)	3 (27%)
Not specified	3 (43%)	3 (33%)	3 (38%)	3 (19%)	0 (0%)	4 (36%)

porated in Delaware, but only obtain a modest number of designations in deals involving public companies incorporated outside of Delaware. More starkly, Delaware courts are *never* chosen in bids for private non-Delaware companies, and other courts are chosen about as often (50% vs. 53%) in bids for private Delaware targets as for private non-Delaware targets.

As shown in Panel B of Table 6, Delaware courts' success in obtaining contract designations for dispute resolution is also concentrated in deals in which it is the Delaware Chancery Court and not the Delaware Superior Court has general jurisdiction within Delaware—that is, in stock purchases and mergers. In asset purchases, where the Delaware Superior Court would have jurisdiction over cases not involving equitable relief, Delaware is *never* chosen as the forum for dispute resolution—even in the seven deals involving targets incorporated in Delaware.

New York is chosen more frequently as the forum for dispute resolution in deals structured as asset purchases (40% of deals where a forum is designated) or stock purchases (16%) than Delaware or any other state. Likewise, with respect to choice of law, New York law is chosen more frequently for deals structured as asset purchases (44%) or stock purchases (28%) than Delaware (19% and 17%) or any other state.

In sum, while Delaware is the modal choice for both law and forum in M&A disputes, its dominance is attributable almost entirely to its corporate law expertise, which applies when the target is incorporated in Delaware and the transaction is subject to the general jurisdiction of the Chancery Court, which promulgates corporate law in Delaware. At least as of 2007–2008,

Delaware courts do not appear to have gained any traction as a forum for resolving M&A disputes based on general contract law expertise, particularly when the transaction is an asset purchase, outside the general jurisdiction of the Chancery Court.

C. Regression Analyses of Choice of Forum

In this Part IV.C, three sets of regressions are presented to explore the factors that correlate with forum selection clauses, and the puzzling fact that a substantial number of M&A agreements fail to specify a forum at all.[75]

1. Choice of Target State of Incorporation as Forum for Disputes

This section uses regression analysis to test whether Alternative Hypothesis 1a or one of the versions of Alternative Hypothesis 1b (from Part II) is more consistent with the data. In addition, Hypothesis 2 is tested. Four logistic regressions are shown in Table 7.[76]In the first column, public target status (*PUBLIC_TARGET*) is regressed against the choice of the target's state of incorporation as a forum for dispute resolution. It is strongly positive, implying the odds that the target's state of incorporation will be chosen are nearly three times higher for public targets than for private targets. In the second column, target incorporation in Delaware (*TARGET_D_INC*) is included as a regressor, and the result is as expected: public status remains significantly positive, but Delaware courts are even more likely to be chosen if the target is a Delaware company.

So far, the results in Table 7 are inconsistent with Hypothesis 1, which would predict a statistically significant odds ratio for Delaware targets but

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[75] In unreported regressions, I fail to replicate the finding in C&D with respect to NY as a choice of forum, viz., that it is more likely to be chosen by non-NY bidders. However, because of the much smaller sample, there are only 16 sample deals in which NY was chosen for the forum, so little should be made of this non-finding.

[76] C&D use simultaneous equations to estimate choice of law and forum, arguing correctly that the choices are interdependent. However, their main results (that Delaware gains designations relative to targets incorporated in Delaware, for both forum and law) do not differ qualitatively from their separate "naïve" regressions of each choice on its own (see Table 8, columns 1 and 4, and 2 and 3), and their method for identifying each equation is unconvincing: courts make law, and factors that influence the choice or effects of one (e.g., jury waivers, arbitration provisions, and specific performance provisions, all analyzed in Parts V and VI, or whether a bid is for all cash, or whether the target and acquirer have the same state of incorporation) seem likely to influence the other, defeating attempts to disentangle the two in the way C&D attempt. Moreover, many other contract choices are also made simultaneously with choice of law and forum (e.g., other DMPs, deal structure, choice of representations and covenants), and these choices may also affect choice of law and forum—an intractable problem for simultaneous equation modeling, even with advances in computing. Nevertheless, as a robustness check, the regressions shown here are re-run in an unreported simultaneous probit model, following methods suggested in Maddala 1983.I use (as they do) separate target and bidder incorporation and all cash deals as a means to nominally identify the two equations in the system, and otherwise include the same variables for choice of law as reported above. The qualitative findings reported here are replicated.

Table 7: Models of Choice of Target State of Incorporation as Forum for Dispute Resolution

	(1)		(2)		(3)		(4)	
	Odds ratio	p-value	Odds ratio	p-value	Odds ratio	p-value	Odds ratio	p-value
PUBLIC_TARGET	2.940	0.000	2.721	0.006	1.000	1.000	0.725	0.482
TARGET_DE_INC			3.496	0.000	1.235	0.760	1.343	0.661
TARGET_DE_INC_X_PUBLIC					7.286	0.044	6.698	0.047
ASSET_PURCHASE							0.126	0.049
N	120		120		120		120	
p-value of chi-sq	0.0005		0.0000		0.0000		0.0000	
Pseudo-R-squared	0.0496		0.1117		0.1477		0.1477	

Models are logistic. Dependent variable is whether the target state of incorporation is chosen as forum for dispute resolution. Standard errors clustered by the industry (2-digit SIC code) of the target.

not for publicly held targets, and consistent with Alternative Hypothesis 1b1, which holds that corporate law matters generally to choice of forum in M&A agreements for public companies, and that Delaware courts are the most likely to be chosen for that reason. What about Alternative Hypothesis 1b2? The above table shows that the loading on public targets is entirely due to targets incorporated in Delaware, and that the loading on Delaware targets is entirely due to public targets. That is, the "double match" between target states of incorporation and Delaware, on the one hand, and choice of forum, on the other hand, is limited to public targets incorporated in Delaware. In other words, Delaware courts are viewed as best at interpreting Delaware corporate law, but are not viewed as important otherwise, and courts outside of Delaware are not viewed as particularly good at interpreting their own state corporate law, even in public target deals where corporate law matters most.

This conclusion is reinforced by column (4), which shows that a match between the target's state of incorporation and the choice of forum is less likely in asset purchases, even after controlling for public target status. Consistent with Hypothesis 2, target states of incorporation, and the related set of corporate law issues, are generally unimportant in asset purchases. In unreported regressions, stock purchases are tested, both separately and together with asset purchases, and they do not have any statistically significant relationship with a match between target state of incorporation and choice of forum. This is consistent with the idea that—at least for public target deals—stock purchases, which do trigger some corporate law issues, are viewed as within the special expertise of the Delaware Chancery Court, along with mergers.

2. Choice of Delaware as Forum for Disputes

The analysis in Section 1 reinforces the conclusion from Part IV.D that Delaware's attractiveness is confined to deals involving publicly held Delaware target companies structured as mergers, and more generally shows that

choice of target state of incorporation is most likely where corporate law disputes are more likely (for public targets and mergers). This section directly models the choice of Delaware as forum, and provides a further test of whether Alternative Hypothesis 1a or Alternative Hypotheses 1b1 or 1b2 is more consistent with the data, and also tests Hypothesis 3.

Table 8 presents four logistic models of the choice of Delaware as forum selected in sample M&A contracts for disputes. In the first model, target company status as an SEC-registered company is included alone as a regressor. In the second model, target incorporation in Delaware is introduced, to control for the likelihood that Delaware courts would be viewed as an ideal forum for litigating disputes involving Delaware companies. In both models, the expected odds ratio on each regressor is above one: a deal for a public company is more likely to generate corporate law disputes, and a Delaware company is more likely to generate corporate law disputes that would fall within the acknowledged expertise of the Delaware courts.

In the third model, a dummy variable (*NONMERGER*) is introduced, which is equal to one if the deal structure is either a stock purchase or asset purchase, along with an interaction term (*NONMERGER_X_PUBLIC*), each of which proxies for the likelihood that corporate law issues are more likely to be important in disputes arising out of the deal.[77]The expected odds ratio on NONMERGER is below one, as asset and stock purchases are less likely to generate corporate law disputes than mergers or other deal structures relying on corporate law mechanisms such as reverse stock splits or freezeout mergers. The expected odds ratio for the interaction term is unclear—it is included to allow the NONMERGER dummy to carry only the effect of ordinary stock and asset purchases in the private target setting, rather than being diluted by the effect of public company targets.

Finally, in the fourth model, three additional regressors are added. *LOG_BID_VALUE* (the natural log of the bid value) is added as a proxy for the potential importance of disputes and/or the likelihood that lawyers working on the deal would have found it cost-effective to negotiate a forum selection clause. *B_LAW_PRIV_NUM*, a count of the number of private-target deals handled by the bidder's law firm in the 2000–2006 period, is also added. Private target deals are typically transactions that would not be within Delaware courts' jurisdiction, reducing the odds that the bidder's law firms would be particularly familiar with or favorably inclined towards Delaware courts.[78]*FAMA_MONEY*is a dummy equal to one if the target is in banking

[77] One might have wanted to test just the effect of asset purchases alone on selection of Delaware as forum, consistent with Section 1, but because not a single asset purchase in the sample designates Delaware, the logistic framework is not properly specified using just asset purchases alone.

[78] In unreported regressions, I also attempt to replicate the finding in C&D that the bidder using a "top ten" law firm (data taken from C&D Table 2) increases the odds that Delaware will be selected. While the presence of such a law firm does correlate positively with Delaware as forum in univariate analysis, the sign actually becomes negative and the variable is statisti-

or other financial industry, based on Fama's 12-industry classification,[79] reflecting the possibility that bank deals are different in a variety of ways,[80] and disputes in such deals are likely to have less to do with Delaware's corporate law expertise than with banking or other laws.

The expected odds ratio for LOGBIDVALUE is above one if one believes that Delaware courts are better, or are perceived to be better, in resolving large dollar disputes. The expected odds ratio on the private deal law firm experience variable and the banking dummy are below zero, reflecting the hypothesis that experienced specialists in private company deals or banking deals would be less likely to perceive Delaware as a better forum than other deal law firms.

Table 8: Models of Choice of Delaware Courts as Forum for Dispute Resolution

	(1)		(2)		(3)		(4)	
	Odds ratio	p-value	Odds ratio	p-value	Odds ratio	p-value	Odds ratio	p-value
PUBLIC_TARGET	9.625	0.002	13.485	0.002	4.803	0.006	9.131	0.001
TARGET_DE_INC			21.662	0.000	21.055	0.000	23.968	0.000
NONMERGER					0.096	0.002	0.066	0.010
NONMERGER_X_PUBLIC					6.195	0.063	24.844	0.029
LOG_BID_VALUE							1.983	0.001
B_LAW_PRIV_NUM							0.996	0.021
FAMA_MONEY							0.073	0.005
N	120		120		120		120	
p-value of chi-sq	0.0024		0.0000		0.0000		0.0000	
Pseudo-R-squared	0.1688		0.4020		0.4368		0.5539	

Models are logistic. Dependent variable is whether Delaware courts are chosen as forum for dispute resolution. Standard errors clustered by the industry (2-digit SIC code) of the target.

Table 8confirms the analysis in Part IV.B above: Delaware courts are most likely to be chosen in forum selection clauses in M&A contracts when the target is publicly held, when it is incorporated in Delaware, and when the deal is structured to be or include a merger or other corporate law mechanism.[81] The regression analysis also shows that Delaware is more likely to be chosen if the deal is large (controlling for all of the other factors in the model), but is less likely to be chosen if the bidder's law firm is highly

cally insignificant in multivariate regressions. Again, this may be due to the smaller sample size; only 17 sample bidders relied on top ten law firms.

[79] *See* Kenneth R. French, *Detail for 5 Industry Portfolios*, TUCK SCHOOL OF BUSINESS AT DARTMOUTH FACULTY PAGES (2012), *available at* http://goo.gl/SxszA(listing the industry classifications, which are based on SIC codes).

[80] *See* Coates & Subramanian, *Buy-Side Model*, *supra* note 41, at 319, 394–95 (documenting differences in bank deals); *see also* Cain & Davidoff, *supra* note 5, at 18.

[81] Similar results for these two variables were found in an unreported models of Delaware as the choice of law. The other regressors tested in this section for Delaware as a forum for dispute resolution were not significantly related to choice of law. In unreported regressions, I also confirm the finding in C&D that all cash deals are more likely to designate Delaware, both on its own and in combination with the regressors reported above, but the statistical significance of the variable is marginal ($p>0.0.89$) and inclusion of the variable does not affect the qualitative findings reported above.

experienced in private-target M&A transactions, or if the target is a bank or other financial institution. The coefficients on the variables are stable, and the goodness-of-fit measure suggests that the model captures a large fraction of the variance in the data.

In unreported regressions, all of the results in Table 8 are confirmed if the sample is limited to public targets, with the exception of the non-merger and non-merger interaction terms, because public company targets so rarely use non-merger deal structures. When the same regressions are run on the private target sample alone, the same qualitative results as those reported in Table 8 hold, except that the bidder law firm private deal experience is not statistically significant, consistent with the idea that experienced private target law firms resist the attraction of Delaware as forum choice in public target deals, but have no reason to do so for private targets, since so few private target agreements designate Delaware for disputes resolution. The same qualitative results also hold if Delaware as a choice of law is included in the model, except that the statistical significant on targets incorporated in Delaware is weakened, due to the strong correlation between choice of law and target state of incorporation.

In sum, Delaware remains attractive for choice of forum in M&A transactions, as C&D argue,[82] but only in a subset of deals—large mergers among non-financial public company targets incorporated in Delaware. These findings are exactly as Delaware's reputation and expertise with corporate law would suggest. Admittedly, those deals are important, but the benefits of Delaware's expertise do not appear to carry over more generally to M&A contracts of all kinds, much less business contracts more generally, consistent with E&M.[83]

3. Deals That Do Not Designate a Forum for Dispute Resolution

One puzzle noted in Parts I and III is why so many M&A contracts omit forum selection clauses altogether. Table 9 presents logistic models of the absence of a forum selection clause in sample M&A contracts. In the first model, the regressor is *CROSS_STATE*, a dummy equal to one if the headquarters of the target and bidder are in different states, as a proxy for the potential for bargaining breakdowns, or alternatively as a proxy for transaction costs, as a test of the competing Alternative Hypotheses 9a and 9b.Based on the bargaining breakdown hypothesis, the expected odds ratio for CROSS_STATE would be above one; based on the transaction cost hypothesis, it would be below one.

In the second model, *LAW_ALL_SUM*—the sum of the bid values of all of the bids from 2000–2006 in which the law firms involved in the sample deals were reported in Thomson—is added as a measure of the deal experi-

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[82] Cain & Davidoff, *supra* note 5, at 96.
[83] Eisenberg & Miller, *Ex Ante Choices*, *supra* note 4, at 2011.

ence of the law firms involved, as a test of Hypothesis 10.[84] The expected odds ratio is below one, as more deal experience reduces the odds of leaving out a forum selection clause.

In the third model, *FAMA_MONEY* is introduced, again reflecting the finding above and elsewhere that banking M&A deals are different on a number of dimensions. In the fourth model, *BIG_BID_VALUE* is introduced, a dummy equal to one if the bid value is the highest quartile of bid values for the sample, as another proxy for transaction costs. The expected odds ratio is below one: the higher the value of the bid, the more is at stake in the event of a dispute, and the more valuable a forum selection clause.

Table 9: Models of the Absence of a Forum Selection Clause in M&A Contracts

	(1)		(2)		(3)		(4)	
	Odds ratio	p-value	Odds ratio	p-value	Odds ratio	p-value	Odds ratio	p-value
CROSS_STATE	0.329	0.029			0.694	0.481	0.697	0.494
LAW_ ALL_SUM			0.996	0.012	0.996	0.037	0.996	0.013
FAMA_MONEY					6.210	0.009	6.143	0.008
BIG_BID_VALUE							0.923	0.880
N	120		120		120		120	
p-value of chi-sq	0.0324		0.0164		0.0030		0.0013	
Pseudo-R-squared	0.0700		0.0481		0.1937		0.1938	

Notes. Models are logistic. Dependent variable equals one if a forum selection clause is omitted from the contract. Standard errors are clustered at the industry level (2-digit SIC code).

The regressions provide results that are inconsistent with bargaining breakdown hypothesis, weakly consistent with the transaction cost hypothesis, and strongly consistent with the lawyer experience hypothesis. Cross-state deals correlate with the absence of a forum selection clause, with an odds ratio below one (column (1)), meaning that it is more likely for a forum selection clause to be present in deals that cross state lines, and less likely for in-state deals. The odds ratio implies that the odds that a cross-state M&A agreement designates a forum are roughly one third those for instate deals.[85]This result, however, does not hold up when a control for bank deals—which on this dimension, too, are quite different—is introduced in column (3), and is not resurrected in column (4). Nor are large deals less likely to lack a forum selection clause, as shown in column (4), once the other variables included, inconsistent with Hypothesis 8.[86]

[84] In unreported regressions, an alternative measure, consistent with the conjecture in note 81 above—a dummy set to one if the bidder's law firm had no appearances in the Thomson M&A database in the 2000–2006 period—performed in qualitatively similar ways.

[85] *Cf.* Cain &Davidoff, *supra* note 5, at 17–18, who report that instate mergers represent 30% of the merger contracts in their sample that do not designate a forum for dispute resolution.

[86] Bid value and the law firm experience variable are highly correlated (0.60, $p<.0000$), but a check of the variance inflation factor for the regressors does not indicate a large amount of multicollinearity in the model.

The law firm experience variable, however, comes in as expected and statistically significant—more deal experience reduces the odds of omitting a forum selection clause—both on its own and in the combined model, consistent with Hypothesis 10. In unreported regressions, the experience of the law firm representing the bidder and the target were tested separately, and only the bidder's law firm had an effect similar to that reported for both law firms combined. This suggests that it is the bidder's law firm and not the target's that perceives there to be more at stake in negotiating forum selection clauses, such that its experience is brought to be in making sure they are included in M&A contracts.

V. Arbitration in M&A Contracts

Arbitration clauses can be viewed as a substitute for forum selection clauses. This Part explores how they are related to other observable characteristics of bids, bidders and the law firms involved. More specifically, given the availability of other DMPs (choice of law and forum, and jury waivers), which can produce much of the legal benefits of arbitration without the attendant risks,[87] why are arbitration clauses ever used other than in the smallest of M&A transactions, where the parties would be cost-sensitive?

Prior research has established that large companies commonly use arbitration clauses (see Part I), but do so less commonly in corporate finance settings, such as M&A. Indeed, the prior expectation of the author, based on experience handling scores of such transactions in practice, was that arbitration clauses—at least those covering the entire contract ("whole contract arbitration")—would be absent from all but the smallest transactions, where the cost advantages of arbitration might lead to their use.

Table 10: Share with Whole Contract Arbitration Clauses, by Bid Size and Target Ownership

	Bid size			
Target ownership	Below $10 MM (n=19)	$10 to $100 MM (n=54)	$100 MM to $1 Bn (n=32)	Over $1 Bn (n=14)
Public (n=60)	0%	0%	6%	0%
Private (n=60)	20%	24%	19%	0%

In fact, 11% of the sample includes whole contract arbitration clauses, concentrated in private target bids. Nor are they confined to small deals, as shown in Table 10: they appear in the same share of private target deals between $100 million and $1 billion in value as they do in deals below $10 million.

Consistent with Hypotheses 5 and 6, however, whole contract arbitration is confined to private target deals, and does not appear in the very largest deals. Table 11 tests these factors in a multivariate model, along with

[87] *See* Lispky and Seeber, *supra* note 20, at 25–26.

Hypothesis 7. The dependent variable is a dummy equal to one if the contract contains a whole contract arbitration clause, and the model is logistic. The regressors are dummies equal to one if the target is a public company, if the deal is in the top quartile of sample bid value (i.e., over $242 million), and if the deal is a cross-border deal. Each variable is significantly related to whole contract arbitration, even after controlling for the others.

Table 11: Model of the Presence of a Whole Contract Arbitration Clause in M&A Contracts

	Odds ratio		p-value
PUBLIC_TARGET	0.046		0.003
BIG_BID_VALUE	0.173		0.032
CROSS_BORDER	3.141		0.000
N		120	
p-value of chi-sq		0.0000	
Pseudo-R-squared		0.2048	

Notes. Models are logistic. Standard errors are clustered by the target's industry (2-digit SIC code).

No other observables correlate strongly with whole contract arbitration clauses. One might have thought, for example, that such clauses might be more common in deals that cross state lines, on the ground that arbitration is a neutral forum, but such deals are no more or less likely to rely on such clauses in this sample than other deals. One might have thought that deals involving targets incorporated in Delaware would be less likely to use such clauses, since those deals are more likely to rely on Delaware as a choice of forum, and because Delaware courts are often thought to be viewed favorably and as neutrals, but such deals are no more or less likely to rely on such clause than other deals. One might also have thought that contracts failing to choose a forum might be more likely to rely on arbitration, since the arbitration clause would be enforceable in any court system, but if anything, arbitration clauses are marginally less common in contracts that fail to designate a forum ($p < 0.11$).

Finally, one might have thought that only inexperienced law firms would rely on whole contract arbitration, and, indeed, a simple t-test of the mean of LAWALLSUM for deals relying on whole contract arbitration shows that the law firms involved have less experience than those deals that do not ($p<0.03$). However, once the status of the target as publicly held and the fact that the deal is particularly large is controlled for, law firm experience does not have an independent statistically significant effect on the use of whole contract arbitration clauses. One of the targets in a deal governed by a contract containing such a clause was represented by a top-ten law firm (Latham & Watkins), and another was represented by Hunton& Williams; one bidder was represented by Vinson & Elkins, and another was repre-

sented by Andrews Kurth. None of these law firms can be characterized as inexperienced in M&A.

What about Hypothesis 7? Is arbitration of price-adjustment clauses common in contracts that call for price adjustments? In fact, it is quite common. Table 3 above shows that 83% of contracts containing price-adjustment clauses also contain clauses mandating arbitration of disputes arising out of those price-adjustment clauses. The prevalence of arbitration in this slice of M&A contrasts strikingly with the relatively few contracts that contain whole contract arbitration clauses (11%).

Moreover, also consistent with Hypothesis 7, such narrowly focused arbitration is common in bids for private targets, even in very large bids involving experienced law firms, as shown in Table 12. In the larger deals, in fact, price-adjustment clauses are even more common than in smaller deals, and even more common when experienced law firms are involved than when they are not, although the differences are not statistically significant in simple t-tests. Law firms involved in the billion-dollar deals in the sample that contain price-adjustment clauses include Cravath and Jones Day, both highly experienced M&A law firms.

Table 12: Share with Price Adjustment Clause Arbitration Clauses, by Bid Size

	Bid size			
Law firms in top quartile of M&A deals, 2000–2006, by number	Below $10 MM (n=4)	$10 to $100 MM (n=20)	$100 MM to $1 Bn (n=12)	Over $1 Bn (n=4)
Firms in top quartile (n=7)	— (n=0)	50% (n=2)	100% (n=3)	100% (n=2)
Firms below top quartile (n=33)	50% (n=4)	18% (n=18)	100% (n=9)	50% (n=2)

These findings add another qualification to the dominance of Delaware (or any other court) for dispute resolution in M&A. At least in the narrow context of disputes arising out of price adjustment clauses, which are likely to be handled well by expert auditors, and where decisions are not likely to be improved significantly from appeals, arbitration is a more attractive option for M&A participants than litigation.[88]

[88] Courts continue to have an important role in disputes arising out of M&A contracts that arguably involve price adjustment clauses, however, because litigants can dispute whether the underlying dispute in fact is one for which arbitration has been chosen in the contract. *See, e.g.*, McGraw-Hill Cos., Inc. v. Sch. Specialty, Inc., 814 N.Y.S.2d 562 (2006) (interpreting contract on whether arbitration covered dispute under price adjustment clause or litigation in court was appropriate for misrepresentation).

VI. Specific Performance Clauses

In one last empirical analysis, the hypotheses developed in Part II regarding specific performance clauses are tested in a multiple regression framework, reflected in Table 13. Each variable proxies for the one of those hypotheses, except FAMA_MONEY, which as before is included to control for the possibility that bank deals are different from other M&A transactions, and each variable has been previously introduced in the regressions above, except NEWBIE_LAW_PUBLIC, which is a variable specifically designed to test for the absence of public target M&A experience.

Table 13: Models of the Inclusion of a Specific Performance Clause in M&A Contracts

	(1)		(2)		(3)		(4)	
	Odds ratio	p-value	Odds ratio	p-value	Odds ratio	p-value	Odds ratio	p-value
PUBLIC_TARGET	3.143	0.002	2.660	0.020	2.661	0.025	2.637	0.030
NEWBIE_LAW_PUBLIC			0.131	0.001	0.171	0.010	0.149	0.006
LOG_BID_VALUE					1.170	0.188	1.723	0.187
FAMA_MONEY							3.098	0.085
N	120		120		120		120	
p-value of chi-sq	0.0018		0.0046		0.0012		0.0002	
Pseudo-R-squared	0.0559		0.1733		0.1832		0.2000	

Notes. Models are logistic. Dependent variable equals one if a forum selection clause is omitted from the contract. Standard errors are clustered at the industry level (2-digit SIC code).

The results are consistent with each of Hypotheses 12 and 14: deals for public targets are far more likely to include a specific performance clause, in all of the models; and deals that involve law firms that lack public target experience are far more likely to leave them out, even with a control for public target status. In unreported regressions, NEWBIE_LAW_PUBLIC is regressed (alone and together with LOG_BID_VALUE and FAMA_MONEY) in the subsample of private target bids on their own, and in the subsample of public target bids on their own, and the same qualitative results are found. These results are strongly suggestive that the M&A specializations of a given law firm have spill-over effects on the DMPs included in other M&A contracts, even in bids that do not have the same characteristics as the primary specialization of the law firms involved. Only weak support is found for Hypothesis 13—the odds ratios on bid size are above one, but they are not statistically significant.

Implications

To recap the findings of the paper: the DMPs included in a sample of 120 randomly chosen M&A contracts from 2007 and 2008 are systematically correlated with target characteristics, such as ownership, state of incorporation and industry, as well as with the experience of the law firms involved. Target ownership, in particular, is a powerful correlate, consistent

with hypotheses that the interactions of corporate law and dispersed ownership influence the techniques with which deals get done, and the contract terms used to carry out those deals.

With respect to forum selection clauses, the news is mixed for fans of Delaware, or for fans of Delaware courts as the primary advantage for Delaware in the competition for corporate charters. On the one hand, Delaware courts are chosen more often than any other forum, and their dominance in public company deals is striking: when publicly held targets are incorporated outside Delaware, the targets' states of incorporation are no more likely to be designated as the forum for dispute resolution than courts in other states. On the other hand, Delaware's courts' dominance derives exclusively from public targets incorporated in Delaware. In private target deals, Delaware courts are chosen only 20% of the time even in deals for targets incorporated in Delaware, and *never* for private targets incorporated elsewhere. They are also never chosen in deals structured as asset purchases. In short, Delaware's dominance in the market for corporate charters, and the Delaware courts' well-known virtues and dominance in public target M&A, do not appear to provide Delaware courts with substantial spill-over benefits in the competition for forum selections in other, closely related corporate contexts.

Given that Delaware courts are in fact fast and admittedly expert on business generally, it is surprising that more M&A contracts do not designate them for dispute resolution. The gap between Delaware courts' dominance in corporate-law-heavy public target deals, and their inability to make large inroads as the forum of choice for M&A dispute resolution more broadly, suggests that there may be tensions between the two roles. I argue in a separate paper that the virtues of Delaware courts in corporate law contexts may make them less than ideal at doing the ordinary work of resolving contract law disputes. In corporate law cases, Delaware courts have the virtue of paying close attention to factual detail, having a willingness to look beyond forms and surfaces, and keeping a strong moral compass to serve as honest guides to corporate fiduciaries and defenders of dispersed and rationally ignorant and apathetic shareholders. In contract law cases, the parties often want forms to dominate, extrinsic evidence regarding the details of the factual context of the contract has long been deliberately kept out of the picture by the parole evidence rule, there is no clear "little guy" in need of protection from a potentially faithless fiduciary, and an aggressive judicial moralist may have unintended and unfortunate consequences for reaching sound decisions.[89]

With respect to arbitration, whole contract arbitration is confined to private target deals. But in those deals, whole contract arbitration clauses are surprisingly present even when the deals are fairly large, and are handled by sophisticated law firms. Whole contract arbitration clauses are absent from

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[89] *See* John C. Coates IV, *One Hat Too Many? Delaware's Moralism in M&A Contract Enforcement* (2011) (unpublished manuscript) (on file with author).

only the very largest deals. Arbitration is also more common in cross-border deals, and arbitration clauses of a more focused nature—covering price-adjustment clauses—are common even in contracts for very large private target bids.

Together, these findings suggest the principal advantage of arbitration in M&A is not the conventional notion of lower litigation costs, although that no doubt plays a role in leading law firms to use whole contract arbitration in smaller deals. If lower costs were the main driver, one would expect the use of whole contract arbitration to taper off gradually, and at a lower deal value level than it does. Rather, the evidence suggests that arbitration promises other benefits—such as improved outcomes in the context of price-adjustment clause disputes, where specialized auditor-arbitrators are likely to do a better job than even relatively expert Delaware courts in resolving what are essentially accounting or measurement disputes. Arbitration by designated arbitrators also promises the benefit of greater neutrality for foreign (non-US) bidders, who may worry that any US-based court will tend to favor a US-based litigant in an M&A dispute, perhaps particularly in very large transactions. Finally, arbitration appears to be least useful where the law is composed of relatively unclear standards, as in the fiduciary duty context so important to public company deals. In those contexts, the risk of either a compromise decision or an incorrect decision makes the use of arbitrators less appealing than reliance on expert Delaware courts.

Finally, the data on forum selection clauses and specific performance clauses provide evidence that the quality of lawyering varies significantly, even on the most "legal" aspects of the M&A contract. Law firms that have lots of M&A experience, but experience primarily in the private target context, are less likely to choose Delaware courts as the forum for disputes. Law firms that have little M&A experience tend to omit forum selection clauses altogether. Law firms that have little public target experience (even if they have private target experience) tend to omit specific performance clauses. These correlations are all robust to inclusion of other observable factors likely to determine the use of these DMPs.

These findings suggest that M&A legal services remain a highly opaque and difficult area for even sophisticated clients to police. As with takeover defenses, tax litigation and M&A completion rates,[90] among other settings, lawyers seem to matter, in the sense of affecting legal choices that matter to legal and financial outcomes. Market and reputational constraints do not eliminate the importance of corporate clients finding expert advisors. More specifically, the varied DMPs adopted by M&A firms with different special-

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[90] *See generally Explaining Variation in Takeover Defenses*, *supra* note 64, at 1301; *see also* Leandra Lederman and Warren B. Hrung, *Do Attorneys Do Their Clients Justice? An Empirical Study Of Lawyers' Effects On Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235 (2006); *see also* C.N.V. Krishnan and Ronald W. Masulis, *Law Firm Reputation and Mergers and Acquisitions*, (ECGI – Finance Working Paper No. 316, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443384.

izations—public vs. private targets, in particular, in the results presented here—suggest that it is not sufficient for a client simply to find a law firm with a degree of experience in a widely defined field, even a field that might appear to be narrow to outsiders, such as M&A. In fact, M&A lawyers specialize, by type of deal, by industry, by size of deal, and in other ways, and these different specializations lead to greater degrees of experience, and expertise, for otherwise equally experienced lawyers, and these different degrees of experience in different types of M&A result in difference contracting choices.

APPENDICES

A. Obtaining an M&A Agreement for Public Company Targets Via EDGAR

One can take the following simple steps to find a merger agreement. As an example, the steps locate the merger agreement filed by Hewlett-Packard for its 2001 merger with Compaq on the SEC's EDGAR system. Start by going to the SEC's website, www.sec.gov and doing the following:

- Click "*Filings & Forms (EDGAR)*," then
- Click "*Search for Company Filings*," then
- Click "*Company or fund name. . ..*"
- Once there, type in "Hewlett" as "*Company Name*," then
- Click "*0000047217*" (the first row of the chart).
- Type "*8-K*" in the box provided for "*Form Type*,"
- Type "*20020101*" in the box labeled "*Prior to*,"
- Check "*Exclude*" under "*Ownership*?" and then
- Click "*Search*.

The relevant Form 8-K was filed on 9/4/01, the day the merger was announced, and the merger agreement is an exhibit to that filing.

B. Transactions in a Control Bid Dataset

Date announced	Target name	Bidder name	Public or private target?	Link to Contract
1/3/07	Sigma Metals Inc	Gales Industries Inc	Private	
1/9/07	PrairieWave Communications Inc	KnologyInc	Private	
1/16/07	Allendale Pharmaceuticals Inc	Synova Healthcare Grp Inc	Private	
1/18/07	Colgan Air Inc	Pinnacle Airlines Corp	Private	
1/22/07	First Haralson Corp	WGNB Corp	Private	
1/24/07	American Community Newspapers	Courtside Acquisition Corp	Private	
1/25/07	TeleCommunication Systems-Div	Stockgroup Info Sys Inc	Private	
2/1/07	Midrange Computer Solutions	Datalink Corp	Private	
2/21/07	Output Exploration LLC	Exploration Co of Delaware Inc	Private	
3/7/07	Princeton Server Group Inc	TelVue Corp	Private	
3/11/07	Copperfield LLC	Coleman Cable Inc	Private	
4/3/07	Resorts East Chicago	Ameristar Casinos Inc	Private	
4/10/07	Adorn LLC	Patrick Industries Inc	Private	
4/16/07	AmeriPathInc	Quest Diagnostics Inc	Private	
4/18/07	FNB FinlCorp,ThreeRivers,MI	Southern Michigan Bancorp, MI	Private	
4/18/07	Goldking Energy Corp	Dune Energy Inc	Private	
4/26/07	Davison Energy-Related	Genesis Energy LP	Private	
5/4/07	Westin Atlanta Airport	Interstate Hotels & Resorts	Private	
5/10/07	InteliStaf Holdings Inc	Medical Staffing Network Hldgs	Private	
5/11/07	Pocono CmntyBk,Stroudsburg,PA	First Keystone Corp	Private	
5/14/07	Capital City Holding Co Inc	North Pointe Holdings Corp	Private	
5/17/07	Calumet Florida LLC-Oil Ppty	BreitBurn Energy Partners LP	Private	
5/17/07	Rader Farms Inc	Inventure Group Inc	Private	
5/18/07	Clark Group Inc	Global Logistics Acq Corp	Private	
5/20/07	DTE Gas & Oil Co	Atlas Energy Resources LLC	Private	
5/22/07	Fremont General-Coml RE	iStar Financial Inc	Private	
6/3/07	Anadarko Petro Corp-Cert asts	Atlas Pipeline Partners LP	Private	
6/5/07	Medical Research Institute	NatrolInc	Private	
6/7/07	LiveDealInc	YP Corp	Private	
6/22/07	Mann Steel Products Inc	National Coal Corp	Private	
6/27/07	Karta Technologies Inc	NCI Inc	Private	
7/13/07	AMVEST Osage Inc	Constellation Energy Partners	Private	
7/22/07	Misys Healthcare-CPR Assets	QuadraMed Corp	Private	
7/23/07	Appalachian Oil Co Inc	Titan Global Holdings Inc	Private	
7/30/07	H-G Holdings Inc	Concur Tech Inc	Private	
7/30/07	Regional EnterprizesInc	Rio Vista Energy Partners LP	Private	
8/2/07	Verizon CommunInc-Telecom	GoAmericaInc	Private	
8/6/07	Hutchinson Telephone Co	New Ulm Telecom Inc	Private	
8/22/07	NTS Communications Inc	XfoneInc	Private	
9/6/07	Gulfshore Midstream LLC-Asts	Gateway Energy Corp	Private	
9/12/07	Phelps Dodge Intl Corp	General Cable Corp	Private	
9/12/07	Quicksilver Resources Inc-Asts	BreitBurn Energy Partners LP	Private	
9/17/07	Cardlock LLC	United Fuel & Energy Corp	Private	
9/17/07	Global Clean Energy Holdings	Medical Discoveries Inc	Private	
9/20/07	Network General Corp	NetScout Systems Inc	Private	
10/4/07	Blue Hill Data Services Inc	BPO Management Services Inc	Private	
10/22/07	InvestacorpInc	Ladenburg ThalmannFinlSvcs	Private	
11/6/07	LogistiCareInc	Providence Service Corp	Private	
11/19/07	New Star Holdings Intl Inc	The Middleby Corp	Private	
12/3/07	Rubicon Integration LLC	Fortress Intl GrpInc	Private	
12/6/07	Everest Broadband Inc	SureWest Communications	Private	
12/11/07	Cortelco Systems Holding Corp	eOn Communications Corp	Private	
12/17/07	Geer Tank Trucks Inc	Continental Fuels Inc	Private	
12/19/07	Woodard LLC	Craftmade International Inc	Private	
12/20/07	GeoLogic Solutions Inc	XATA Corp	Private	
1/16/08	Southpeak Interactive LLC	Global Svcs Partners Acq Corp	Private	
2/12/08	Earth Technology Corp USA	AECOM Technology Corp	Private	
2/12/08	Kennecott Minerals Co	Hecla Mining Co	Private	
2/22/08	BioAuthorizeInc	Genesis Holdings Inc	Private	
9/5/08	State of Franklin Bancshares	Jefferson Bancshares Inc	Private	

1/7/07	Houston Exploration Co	Forest Oil Corp	Public	
1/8/07	Strategic Distribution Inc	Investor Group	Public	
1/8/07	United Surgical Partners Intl	UNCN Acquisition Corp	Public	
1/18/07	ION Media Networks Inc	Citadel Investment Group LLC	Public	
1/19/07	Whittier Energy Corp	Sterling Energy PLC	Public	
1/29/07	PYR Energy Corp	Samson Investment Co	Public	
2/8/07	First Coastal Bancshares,El	CVB Financial Corp,Ontario,CA	Public	
2/13/07	Corillian Corp	CheckFree Corp	Public	
2/16/07	Vantagemed Corp	Nightingale Informatix Corp	Public	
3/19/07	Patapsco Bancorp Inc,Maryland	Bradford Bancorp Inc,Baltimore	Public	
3/22/07	Smithway Motor Xpress Corp	Western Express Inc	Public	
3/27/07	Milastar Corp	Milastar Acquisition Corp	Public	
4/2/07	Tribune Co	Sam Zell	Public	
4/4/07	Ablest Inc	Koosharem Corp	Public	
4/19/07	Heartland Oil & Gas Corp	Universal PptyDvlp&Acq Corp	Public	
5/1/07	Dow Jones & Co Inc	News Corp	Public	
5/2/07	Mity Enterprises Inc	MLE Holdings, Inc. (Sorenson Capital)	Public	
5/14/07	First Albany Cos Inc	MatlinPatterson FA Acquisition	Public	
5/15/07	Dynamic Health Products Inc	GeoPharmaInc	Public	
5/15/07	International Electronics Inc	Linear Corp	Public	
5/16/07	East Penn Financial Corp	Harleysville National Corp,PA	Public	
6/25/07	Neon Communications Group Inc	RCN Corp	Public	
7/3/07	Hilton Hotels Corp	Blackstone Group LP	Public	
7/11/07	Boston Communications Group	Tea Party Acquisition Corp	Public	
8/3/07	Coast Financial Holdings Inc	First Banks Inc	Public	
8/8/07	AptimusInc	Apollo Group Inc	Public	
10/2/07	United Heritage Corp	Blackwood Ventures LLC	Public	
10/6/07	Paivis Corp	Trustcash Holdings Inc	Public	
10/16/07	Pinnacle Gas Resources Inc	Quest Resource Corp	Public	
10/26/07	VerticalNetInc	BravoSolutionSpA	Public	
11/7/07	vFinanceInc	National Holdings Corp	Public	
11/18/07	NatrolInc	Plethico Pharmaceuticals Ltd	Public	
11/30/07	PeopleSupportInc	Investor Group	Public	
12/17/07	IBT Bancorp Inc,Pennsylvania	S&T Bancorp Inc,Indiana,PA	Public	
12/27/07	Document Sciences Corp	EMC Corp	Public	
12/31/07	Transmeridian Exploration Inc	Trans Meridian Intl Inc	Public	
1/8/08	St Lawrence Energy Corp	Nok-Bong Ship Building Co Ltd	Public	
1/14/08	Golden Cycle Gold Corp	AngloGold Ashanti Ltd	Public	
1/17/08	Performance Food Group Co	Panda Acquisition Inc	Public	
1/31/08	Audible Inc	Amazon.com Inc	Public	
2/25/08	Varsity Group Inc	Follett Corp	Public	
3/16/08	Bear Stearns Cos Inc	JPMorgan Chase & Co	Public	
3/17/08	Chief Consolidated Mining Co	Andover Ventures Inc	Public	
3/24/08	TenFold Corp	VersataInc	Public	
3/27/08	QuippInc	Illinois Tool Works Inc	Public	
3/31/08	AirNet Systems Inc	Bayside Capital Inc	Public	
4/20/08	PacketeerInc	Blue Coat Systems, Inc.	Public	
4/29/08	Pyramid Breweries Inc	Independent Brewers United, Inc.	Public	
4/30/08	Bois d'Arc Energy Inc	Stone Energy Corp	Public	
5/12/08	Radyne Corp	ComtechTelecommun Corp	Public	
6/10/08	Superior Essex Inc	LS Cable Ltd	Public	
6/24/08	Memry Corp	SAES Getters SpA	Public	
7/10/08	China Tel Group Inc	Asia Special Situation Acq	Public	
7/10/08	MacroChem Corp	Access Pharmaceuticals Inc	Public	
7/14/08	Ace*Comm Corp	Ariston Global Partners LLC	Public	
7/14/08	Edge Petroleum Corp	Chaparral Energy Inc	Public	
7/16/08	Alpha Natural Resources Inc	Cleveland-Cliffs Inc	Public	
8/29/08	Greenfield Online Inc	Microsoft Corporation	Public	
9/15/08	First Communications LLC	Renaissance Acquisition Corp	Public	
11/20/08	Image Entertainment Inc	Nyx Acquisitions	Public	

C. Size-Industry Matched Subsamples 2007–2008, Bid and Match Statistics

Size-Industry Matched Subsamples 2007–2008, Bid and Match Statistics					
	Public Target		Private Target		P-value of t-test of means or
Bid value ($MM)	Value	N	Value	N	rank-sum test
Maximum	$20,168	60	$2,000	60	
Mean	$859	60	$252	60	0.12
Median	$72	60	$51	60	0.33
Minimum	$1	60	$1	60	
Bids above full-sample median	55%	60	45%	60	0.14
Industry Matches	N		Matches		% Matches
4-digit SIC match	60		37		62%
3-digit SIC match	60		43		72%
2-digit SIC match	60		57		95%
1-digit SIC match	60		58		97%
Fama-French-5+Finance match	60		60		100%
Target Industry (Fama-French-5 + Finance)	N		%		% Matches
1.Consumer	8		13%		100%
2.Manufacturing	6		10%		100%
3.High Tech	20		33%		100%
4.Healthcare	1		2%		100%
5.Other (ex Finance)	18		30%		100%
6.Finance	7		12%		100%
Bid Value Matches	Value		% of Pairs		N
Median bid value ($MM)	$62				120
Median bid difference ($MM)	$5				60
Median bid difference as % of median bid	7%				60
Difference < 5% of median bid	12		20%		60
Public bid larger	38		63%		60
Public bid smaller	22		37%		60
	Public Target		Public Target		P-value of t-test of means or
Number of record shareholders	Number	N	Number	N	rank-sum test
Maximum	26,000	58	369	28	
Mean	2,167	58	39	28	0.00
Median	465	58	5	28	0.00
Minimum	23	58	1	28	

Criteria:US targets, control bids, bidder owns < 20% prior to bid, bid not still pending, agreement at SEC
Private targets:public bidder, private target, assets reported, target assets > 20% bidder assets
Public targets:public target, same industry as matched bid, closest in bid size

D. Law Firms in Control Bid Sample

Law firms	Appearances in Sample	Law firms	Appearances in Sample
None	11	DeCampo, Diamond & Ash	1
Skadden, Arps, Slate, Meagher &Flom LLP	8	Dechert	1
Solo Practitioner	7	Dewey Ballantine LLP	1
Latham & Watkins	6	Finn, Dixon &Herling	1
Andrews Kurth LLP	5	Foley & Lardner	1
Fulbright &Jaworski L.L.P.	5	Franklin, Cardwell & Jones, P.C.	1
Shearman & Sterling LLP	5	Fredrikson& Byron	1
Akin, Gump, Strauss, Hauer& Feld	4	Freshfields Bruckhaus Deringer	1
Bingham McCutchen LLP	4	Goodwin Procter LLP	1
DLA Piper	4	Gould & Ratner LLP	1
Greenberg Traurig	4	Graham Dunn PC	1
Simpson Thacher& Bartlett	4	GuzovOfsink, LLC	1
Baker DonelsonBearman Caldwell &Berkow	3	Harris, Finley &Bogle, P.C.	1
Blank Rome LLP	3	Hillis Clark Martin & Peterson, P.S.	1
Cleary Gottlieb Steen & Hamilton	3	Hiscock& Barclay LLP	1
Fried, Frank, Harris, Shriver & Jacobson LLP	3	HodgsonRuss	1
GraubardMollen& Miller	3	Hogan &Hartson	1
Haynes and Boone, LLP	3	Holland & Knight LLP	1
Jones Day	3	Honigman Miller Schwartz and Cohn LLP	1
McDermott Will & Emery LLP	3	Horgan, Rosen, Beckham &Coren, LLP	1
Morgan Lewis &Bockius	3	Horwitz, Cron& Jasper, P.L.C.	1
Ropes & Gray LLP	3	Howard & Howard	1
Sichenzia Ross Friedman Ference LLP	3	Jenner & Block	1
Vinson & Elkins LLP	3	Keller Rohrback P.L.C.	1
Wachtell Lipton Rosen & Katz	3	Kirkland & Ellis	1
Bybel Rutledge LLP	2	Leonard, Street &Deinard	1
Cooley Godward LLP	2	Lindquist &Vennum	1
Dorsey & Whitney LLP	2	Littman &Krooks, P.C.	1
Eaton & Van Winkle	2	Luse Lehman Gorman Pomerenk& Schick	1
Edwards Angell Palmer & Dodge LLP	2	Malizia and Spidi, P.C.	1
Faegre& Benson LLP	2	McAfee & Taft	1
Fenwick & West LLP	2	Messerli & Kramer, P.A.	1
Gibson Dunn &Crutcher	2	Mintz Levin Cohn Ferris Glovsky&Popeo, P.C	1
Hunton& Williams	2	Mirsky& Block PLLC	1
Jackson Walker L.L.P.	2	Morris Manning & Martin LLP	1
KattenMuchinRosenman LLP	2	Muldoon Murphy &Aguggia LLP	1
Kilpatrick Stockton LLP	2	Munger, Tolles& Olson LLP	1
Manatt, Phelps & Phillips, LLP	2	NexsenPruet, LLC	1
Mayer, Brown, Rowe & Maw LLP	2	Nixon Peabody LLP	1
Pillsbury Winthrop Shaw Pittman LLP	2	O'Melveny & Myers	1
SonnenscheinNath& Rosenthal	2	O'Neill Law Group PLLC	1
Stinson Morrison Hecker LLP	2	Orrick Herrington & Sutcliffe LLP	1
Sullivan & Cromwell	2	Osborn Maledon, PA	1
AkermanSenterfitt	1	Patton Boggs LLP	1
Allen &Overy	1	Paul, Weiss	1
Anolik& Associates, P.C.	1	Pepper Hamilton LLP	1
Arnold & Porter	1	Perkins Coie	1
Baker & Hostetler LLP	1	Powell Goldstein LLP	1
Baker & McKenzie LLP	1	Proskauer Rose LLP	1
Baker Botts LLP	1	Rutan& Tucker, LLP	1
Bass Berry & Sims PLC	1	Saidis Flower & Lindsay	1
Berkman, Henoch, Peterson &Peddy, P.C.	1	Saul EwingLLP	1
Berkowitz, Trager&Trager, LLC	1	Scudder Law Firm	1
BilzinSumbergBaena Price & Axelrod LLP	1	Seward &Kissel LLP	1
Briggs and Morgan, P.A.	1	Shannon, Martin, Finkelstein & Alvarado, P.C.	1
Butler, Snow, O'Mara, Stevens &Cannada, PLLC	1	Sidley Austin LLP	1
Calfee, Halter & Griswold LLP	1	Snell & Wilmer LLP	1
Cantor Arkema, P.C.	1	Stevens & Lee, a Professional Corporation	1
Carlton Fields PA	1	Stradley Ronan Stevens & Young	1
Cassels Brock & Blackwell LLP	1	Thompson & Knight LLP	1
Chadbourne& Parke LLP	1	Thompson Coburn	1
Choate, Hall & Stewart LLP	1	Troutman Sanders LLP	1

Christian & Barton	1	Troy & Gould	1
Clark Wilson LLP	1	Vanderpool, Frostick&Nishanian, P.C.	1
Clifford Chance	1	Vedder, Price, Kaufman &Kammholz, P.C.	1
Cornman& Swartz	1	Vorys, Sater, Seymour & Pease	1
Cravath, Swaine& Moore	1	Warner Norcross & Judd	1
Crowell & Moring, LLP	1	Watkins Ludlam Winter &Stennis, P.A.	1
Davis Polk & Wardwell	1	Weil Gotshal&Manges	1
Debevoise& Plimpton LLP	1	Williams SchifinoMangione & Steady, P.A.	1
		Willkie Farr & Gallagher	1